No. 18,200

IN THE

United States Court of Appeals

For the Ninth Circuit

MARVIN SHERWIN,
Appellant,

v.

UNITED STATES OF AMERICA,
Appellee.

BRIEF FOR APPELLEE

CECIL F. POOLE,
United States Attorney,

DAVID R. URDAN,
Assistant United States Attorney,

LAWRENCE K. BAILEY,
Attorney, Department of Justice,

Attorneys for Appellee,
United States of America,
422 Post Office Building,
Seventh and Mission Streets,
San Francisco 1, California

Recorder Printing and Publishing Co., San Francisco

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JURISDICTION

Jurisdiction is invoked by appellant under Title 26, United States Code, Sections 7201 and 7206(1), and Title 28, United States Code, Sections 1291 and 1294(1).

STATEMENT OF THE CASE

An indictment was returned in the Northern District of California on July 14, 1961, charging appellant with three counts of wilful attempted income tax evasion for the years 1954, 1955, and 1956, in violation of Section 7201 of the Internal Revenue Code of 1954 (Title 26 U.S.C. Section 7201), and also with three counts of making and subscribing joint income tax returns which were verified by a written declaration that they were

made under the penalty of perjury for the same years, 1954, 1955, and 1956, which returns the appellant did not believe to be true and correct as to every material matter, in violation of Section 7206(1) of the Internal Revenue Code of 1954 (Title 26 U.S.C. Section 7206(1)).[1]

The amounts alleged in the first three counts of the indictment were as follows:

INCOME

Year	*Reported*	*Corrected*	*Additional*
1954	$21,221.01	$ 33,993.64	$12,772.63
1955	20,796.96	32,664.03	11,867.07
1956	22,986.79	35,354.28	12,367.49
TOTALS	$65,004.76	$102,011.95	$37,007.19

TAX

Year	*Reported*	*Corrected*	*Deficiency*
1954	$ 5,743.60	$11,396.82	$ 5,653.22
1955	5,582.84	10,732.01	5,149.17
1956	6,414.98	12,007.37	5,592.39
TOTALS	$17,741.42	$34,136.20	$16,394.78

The material matter in the last three counts which appellant was alleged to have knowingly failed to disclose at the time he made and subscribed the joint income tax returns was that he and his wife had additional income of $12,801.45, $12,396.70 and $12,580.19 over and above that which he had reported for the years 1954, 1955 and 1956, respectively.

The trial of the case commenced on April 30, 1962, before District Judge Alfonso J. Zirpoli, and concluded on May 14, 1962, with a guilty verdict on all counts.

On May 25, 1962, Judge Zirpoli assessed a sentence

[1]Appellant's Opening Brief, Appendices, pp. i-vi, hereinafter referred to as "O.B.A. i-vi"; appellant's opening brief will be designated "O.B."

of imprisonment for one year and a $1,000 fine on Count 1, with the prison sentences on the five remaining counts concurrent with the one-year sentence on the first count.

Appellant's returns were prepared by his accountant (Joyce) from handwritten sheets (Exs. 58, 59, 60) recapping the items of income and the items of expense which were furnished to the accountant by appellant. (Tr. 280-284). The accountant never saw any of appellant's records in preparing the returns (Tr. 285). The sheets furnished by appellant to his accountant did not contain any of the omitted items of income (Tr. 282; 287-288) nor did the accountant know about any of the omitted items (Tr. 290-296). Appellant stated that he had no formal books; his checkbook was his means of recording his income; he would analyze the receipts and expenditures shown by his check book stub; he would then recapitulate these items and turn them over to the accountant for preparation of the return. When appellant received fees in a case he would make a note on his check book stub to reflect this income. Appellant knew he was on the cash basis. (Tr. 344-345, 591-592.)

The same accountant prepared the Tarman-Sherwin partnership returns; from the partnership returns, the accountant secured the income figures for appellant's individual returns (Tr. 602). The following amounts were reported on appellant's 1954, 1955 and 1956 returns as his share of this partnership income: $1,182.90, $2,891.71 and $5,281.88 (Exs. 1, 2, 3). Appellant was aware that a partner reported his income from a partnership in the year in which the partnership earned income whether he had received cash in that year or not (Tr. 344).

The agent who was examining appellant's returns, several times, beginning in September 1957, requested appellant's checkbook and checks to audit the income items, since this was appellant's only method of recording them. However, appellant did not furnish the agent any checkbook stubs from the Central Bank account for the prosecution years; also some twenty paid checks for 1956 alone were missing, appellant claiming they were lost (Tr. 356-357) despite the fact that appellant's return for 1956 (Ex. 3) had been prepared only a few months earlier, for which appellant stated he had used his checkbook (Tr. 769).

On several occasions, the agent asked appellant what bank accounts he had. Appellant reiterated each time that he only had two accounts, a trustee account for his law practice, at the Central Bank, and the account at the Oakland Bank of Commerce for his personal household matters, and that he had no other bank accounts. (Tr. 348, 350-354, 372.) Appellant in fact had other bank accounts: among them, a Beresa Corporation account in the Bank of America, Marvin Sherwin, Trustee (Exs. 31, 51, 56); and a Crocker-Anglo Bank Main Office, Oakland, account of Estate of Preston Beckwith, Marvin Sherwin, Trustee (Tr. 357-359). These accounts either had deposits or withdrawals of unreported income for the prosecution years. Appellant admitted that he had made numerous deposits to the Beresa account at the Bank of America which had nothing to do with Beresa business (Tr. 775, 796). For example, two of the Willows Commission checks in the amounts of $1,850 and $1,650 (Ex. 31; Tr. 154) were deposited to the Bank of America account on February 15, 1955, and August 22, 1955 (Tr. 476-484;

776, 790). Also the check for the unreported fee from the Beckwith Estate was drawn on the Crocker-Anglo bank account in Oakland. (Tr. 771.)

Another undisclosed bank account was one in the name of E. O. Thompson, at the American Trust Co., Oakland, which was used to deposit the proceeds from the sale of the property at 15 Myrtle Street to Mr. McGee. Appellant testified that the reason he opened the account in Thompson's name was because he was facing three or four lawsuits and, at that time, he was attempting to conceal this bank account from his creditors. There was other concealment with respect to this transaction. The mortgage which appellant took on the McGee property was recorded in the name of a realtor named Pleitner, even after the death of Mr. Pleitner. McGee's interest payments on the mortgage were among the items of appellant's unreported income. Again, appellant claimed that one of his reasons for keeping the property in Mr. Pleitner's name was because of the lawsuits he was facing (Tr. 759-765).

Appellant had practiced law from 1926 until September or October 1953 when he went on the bench as a judge of the Superior Court of California in and for the County of Alameda. From 1945 to 1953 appellant also served in the California State Assembly (Tr. 587-589). He was a member of its Revenue and Taxation Committee which writes all tax legislation for the State of California; he was also chairman of the Ways and Means Committee (Tr. 848-851).

From 1943 until 1949 appellant kept the books of the Tarman-Sherwin partnership and at least for the years 1945 and 1946 prepared and filed whatever partnership tax returns were filed. (Tr. 684-732.) Appellant con-

ceded that he knew the difference between capital gains and ordinary income and that he had frequently discussed the matter with his accountant (Tr. 735-736). Indeed, on the partnership returns for 1945 and 1946 (Ex. 71) which appellant prepared, there were capital gains computed and reported.

In response to the Bechtel Corporation accountant's request for advice with respect to the taxability of multiple corporations, appellant wrote a memorandum as to the state of the law so as to permit Bechtel Corporation to secure the benefits of lower taxation brackets for the corporations affiliated with Bechtel (Tr. 696-698). Later, in 1955 or 1956 when the Beresa Corporation was having tax troubles with the Government with respect to the several Beresa affiliated corporations, appellant gave advice to Beresa in the matter; in connection with this, appellant prepared and submitted a memorandum (Ex. 41) on behalf of Beresa concerning the tax advantages of multiple corporations (Tr. 233-237; 697-703) .

The evidence shows that the following specific items of income were not reported on appellant's tax returns (Exhibits 67, 68, 69; Tr. 448-475).

	1954	*1955*	*1956*
1. *Legal Fees*:			
Milo Ayers	$ 2,708.32		
Beckwith Estate (Executor Fee)	911.86		
Beresa, Inc.			
Cash	250.00		
Credit Card	669.78	$ 640.06	$ 320.39
Stock Anderson Hgts. Water Co.			10,000.00
Chip Steak Co.	3,833.07		
Crozier C. Culp	682.26	774.85	1,182.66
To others for Sherwin		838.66	
Nichols, Richard, etc.	2,807.71		
J. H. Tarman		500.00	

2. *Commissions*:			
J. H. Tarman	1,500.00		
Wright		9,350.00	
3. *Partnership Income*:			
Cheney Bros. Chip Steak Co.		192.71	150.73
Crozier Culp, Joint Venture		414.27	
4. *Interest*:			
Emanuel D. McGee	245.41	179.56	182.14
Series E. Bonds		148.15	
Director, I.R.S.		358.44	
5. *Dividends*:			
Melfort Company			1,744.27
Totals	$13,608.41	$13,396.70	$13,580.19

The following summarizes the evidence with respect to the unreported items:

1. Legal Fees

On his return for 1954, appellant reported "sale of law practice," $1,216.66. (Tr. 758-759.) Appellant told Agent Grappo on September 3, 1957, that he actually didn't sell his law practice, but he didn't wish to have his return disclose that he was receiving fees from law practice as he didn't want it to appear that he was engaged in law practice or receiving legal fees after he was a judge. (Tr. 349-350; 379-381.) The amount appellant reported was made up of a remittance for legal services from Milo Ayer of $1,166.66 and a guardianship fee of $50.00 (Tr. 455, 758). However, appellant actually received an additional $2,708.32, above that reported, from Milo Ayer for legal services which he admitted he did not report, saying that he could not state exactly why it was that he had not reported these additional amounts (Tr. 607-608, 758-759).

With respect to the legal fees received: (1) from Crozier C. Culp—constituting 12 checks (Exs. 16, 17, 18) over a three-year period (Tr. 38-44), (2) from the law firm of Nichols, Richard, Allard & Williams, totalling $2,807.71 and (3) from the Beckwith Estate (for Executor's fee) in the amount of $911.86, appellant admitted that he did not report them on his returns and that he knew at the time they were taxable, generally giving as his reason that he just overlooked them or that he just did not have them in mind (Ex. 7; Tr. 774, 807).

The first legal fee received from Beresa during the prosecution years was a $250 check (Ex. 35) which was "on account legal services" (Tr. 204, 208, 244). The second group of items concerned income to appellant in the form of purchases on Shell Oil Company credit cards for all three prosecution years. The credit cards were issued to Beresa and were further issued by Beresa to appellant for his use. Appellant agreed that these purchases on the credit cards constituted income to him and that he had not reported this income from Beresa. (Ex. 7; Tr. 802).

The third Beresa item concerned stock in the Anderson Heights Water Company which was transferred in 1956 to appellant in satisfaction of a $4,000 loan and appellant's $13,250 bill for legal fees owed by Beresa (Tr. 243, 245, 831). By comparing the per share cost to Mr. Wright and Mr. Wetenhall who had paid $25,000 for some of the Anderson stock a few weeks prior to the transfer to appellant, the Government's expert in computing appellant's income arrived at a $14,000 value of the stock, of which $4,000 represented repayment by Beresa to appellant of a loan. The $10,000

balance was considered income to appellant as satisfaction for the $13,250 legal fees bill (Tr. 470-471). Appellant testified that he did not report the Anderson Heights stock received on account of legal fees due him for two reasons: (1) he did not consider the receipt of stock a taxable item until sold because he believed only items of cash were reportable,[2] and (2) he considered the receipt of this stock a security transaction (Tr. 623-624).

A Chip Steak Company check dated January 4, 1954, for $3,833.07 was received by appellant for legal fees rendered in prior years; the fee was not reported on appellant's worksheet (Tr. 808) or on his 1954 return, although appellant agreed that it was an item of taxable income (Tr. 35). At the trial, appellant testified that he had undoubtedly recorded this check on his checkbook stub (Tr. 808) but he could not recall why he had not included the item (Tr. 608-609, 808).

The $500 check from the J. H. Tarman Corporation (Ex. 24) was a 1955 legal fee earned for the appellant's services rendered in Tarman's Suisun Gardens project (Tr. 56-58). Appellant contended that he thought this was either a partnership withdrawal or a gift (Tr. 785-787) even though the Suisun Gardens project was not a partnership enterprise (Tr. 65).

2. Commissions

A $1,500 commission was received in 1954 by appellant from the Tarmans, father and son, real estate operators, for services rendered in effecting the sale of

[2]However, with respect to partnership income, appellant told the agent that he was aware that a partner would report his income in the year in which the partnership earned the income, whether or not he had received the cash in that year (Tr. 344).

certain acreage near Willows, California, to the Beresa Company. The Willows acreage was not an asset of the partnership existing between appellant and J. H. Tarman. (Tr. 61-65.) Appellant similarly contended that he thought this was a partnership withdrawal (Tr. 834).

During the year 1955, appellant received commissions, referred to at the trial as the Willows Commission, totalling $11,000 from Milton A. Wright (Tr. 611-612) for acting as go-between for Wright with Beresa, Inc. and others in connection with arranging a badly needed loan between Wright and the Beresa corporation and for drafting the contract on March 18, 1954 (Tr. 152-159; 822-824).

Payment of $8,000 of this amount was effected by appellant cancelling the $8,000 balance as an offset against money which was owed Wright by a joint venture composed of Tarman, Sherwin and one Schneider. As Wright received payments from Tarman and Schneider in 1955, he turned them over to appellant, thereby completing the $11,000 payment. Appellant reported a $1,650 item on his 1955 return as being "income from former law practice" which has been considered as one of the Willows Commission checks; appellant has been given appropriate credit for this amount in the Government's computation of income (Ex. 68; Tr. 157-160, 463).

Appellant admitted that the worksheet (Ex. 57) which he turned over to the agent during the investigation had listed $6,350 for "Willows Comm," but that the sheet which he turned over to the accountant for preparation of the return contained nothing for this item (Tr. 611-612). Appellant testified that he could not give any reason why the work sheet he gave to the agent

contained only part of the commission (Tr. 818). Despite the fact that appellant had listed $6,350 as income on the sheet turned over to the agent, he nevertheless contended at the trial that he did not consider this receipt as income. The reason he gave was that while in form it was a commission it was really intended by Mr. Bechtel to compensate appellant for the losses he had sustained on the bankruptcy of the Bechtel Corporations (Tr. 612-614, 819, 821-822, 826, 862). Appellant did not offer any explanation as to why he was entitled to omit income from his 1955 return to compensate him for a 1951 stock loss in the bankrupt Bechtel Corporation which had no relation to the 1955 transaction involving the Beresa Corporation.

3. Partnerships

Appellant received some income from a partnership interest in Cheney Brothers Chip Steak Company (Tr. 113-116) and from the Crozier Culp joint venture (Tr. 46-47, 51-52). Appellant testified that Culp reported this item of income to him, but that he gave the matter no attention (Tr. 810). There were additional unreported partnership income items from dividends on the Tarman-Sherwin partnership-owned Melfort Company stock, discussed *infra*.

4. Interest

Appellant received regular monthly interest payments on a mortgage from Emanuel D. McGee. Every month McGee sent his loan payment receipt book (Ex. 8) to appellant, who would compute the interest which was due on the notes and make notations in the book as to the amount of the payment of principal and interest

(Tr. 261-262, 765-766). The mortgage itself was recorded under the name of one Pleitner. (Tr. 764-765). Appellant admitted that he knew the interest was reportable for each year (Tr. 768), explaining that he "just never gave it a thought" (Tr. 609). When appellant sold some Series E. bonds he received $148.15 interest, but did not report it; he testified that he did not know that such interest was reportable (Tr. 778). However, appellant had nevertheless included the bond principal and interest on the schedule of income (Ex. 57) given to the agent during the investigation and then had drawn a line through the item. (Tr. 777.) Appellant also received interest on a tax refund from the Government, but testified that he did not pay any attention to the fact that part of the refund was interest, even though there was a notation on the face of the notice to appellant (Ex. 12) that the interest was reportable (Tr. 779).

While appellant failed to report interest, nevertheless each year appellant claimed substantial amounts of interest expense on his returns (Exs. 1, 2, 3).

5. Dividends

The Melfort Corporation which owned shares of stock in the David Meat Company, distributed that stock to the stockholders of the Melfort Company (Ex. 26; Tr. 122). This distribution represented taxable dividend to the Melfort Company stockholders. Appellant's reportable share of this dividend was $1,844.27 (Tr. 472-474). The shares received by appellant in this distribution were placed in the name of appellant's daughter by appellant (Tr. 197). Appellant had suggested to the daughter that she report the dividend on her income tax returns; he arranged to have the

accountant Wright prepare her return (Tr. 194-195, 200). Accordingly, the daughter reported the dividend on her joint return reporting a total tax liability of $169.62 from this dividend and from other income. Appellant paid the tax on the daughter's return (Ex. 33; Tr. 195-196, 201). While appellant contended at this trial that the stock was his daughter's (Tr. 838), he had, however, at the Santa Rosa trial where the Tarman-Sherwin partnership litigation was taking place, made the flat statement that the stock was his (Tr. 848).

With respect to appellant's contentions at the trial that he was entitled to an operating loss carry-forward from the 1951 bankruptcy of the Bechtel Corporations, the evidence showed that on appellant's 1951 returns (Exs. 63, 64) he had claimed an operating loss on a *loan* made to the Bechtel Corporation, but had claimed only a *capital loss* with respect to the loss on his *stock* investment in the bankrupt Bechtel Corporations. In his 1952 return (Ex. 65), he had carried forward this loss from the Bechtel stock and again merely claimed the maximum allowable capital loss of $1,000. On none of his returns had appellant claimed an *operating loss* on account of his stock loss resulting from the bankruptcy of the Bechtel corporations.[3]

In a letter dated April 13, 1954 (Ex. 75) in connection with appellant's 1951 returns, the Internal Revenue Service had requested substantiation of appellant's claim to being in the business of promoting corporations; appellant was also requested to furnish details as to the

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[3]Appellant's own expert at the trial admitted that in the 1958 return of appellant which he had prepared he had treated appellant's loss resulting from payment of $1,487 in 1958 to the Bank of America as a guarantor on an obligation of the defunct Bechtel Corporation as a *capital* loss to appellant and that he had also treated 1959 and 1960 similar losses in the same way (Tr. 967-970).

claimed $21,115 operating loss and the $30,000 capital loss. To substantiate his assertion on his 1951 return of being in the business of promoting corporations, so as to warrant his claim of $21,115 operating loss on the loan, appellant listed twenty-seven corporations he had formed. With respect to the $30,000 *capital* loss claim, appellant explained to the Internal Revenue Service that this pertained to his loss on the *stock* of the Bechtel corporations (Ex. 75).

Thereafter, based on appellant's representations in his letter, an office auditor in the Internal Revenue Service (Tr. 1004) allowed the $21,115 operating loss claim for the loan on a "tentative adjustment" or what is called a "quickie claim." This is allowed, based solely on the taxpayer's statement without examining the return and without any additional investigation (Tr. 1009-1010). The purpose of the law is to permit the taxpayer to get his money back quickly from the federal government if he needed it (Tr. 1016). Such claims were processed at the rate of three to four hundred a week per one employee (Tr. 1010). There was no final agreement as to the correctness or incorrectness of such an allowance (Tr. 1011; 1015-1016).

At the trial it was established through appellant that there were actually just two corporate groups. The Bechtel Corporation family which constituted the first twenty-three corporations on the list submitted to the Internal Revenue Service (Ex. 75) and the Chip Steak Company, which was made up of the last four corporations on the list. The twenty-three in the Bechtel family of corporations were associated in the same general enterprise of building subdivisions (Tr. 634-635; 691-693, 721). Appellant testified that he guaranteed some

of the financing for Bechtel Corporation; however he admitted such guaranteeing was done jointly with T. R. Bechtel, the other major stockholder (Tr. 716-717). Appellant testified that the purpose of forming the multiple Bechtel family corporations was to secure tax benefits and so that a new subdivision would not be impeded in case one tract (in a separate corporation) was having financial difficulties (Tr. 696-697). In the Bechtel family of corporations the stockholders were the same; the offices were the same; and none of the subsidiary corporations had any employees (Tr. 721-724). Appellant had been receiving a salary from Bechtel (Tr. 726). Appellant testified that the first time he had known that he had been listed on his 1951 return as a promoter of corporations was at this trial (Tr. 749). None of his Bechtel stock had been sold by him to anyone and he had no intention at any of this time to sell any of the stock (Tr. 750).

At the trial, the government expert in making his computation allowed as a deduction from income the maximum $1,000 as a capital loss carry-over from the 1951 return for each of the prosecution years (Exs. 57, 58, 59; Tr. 486).

The Court instructed the jury at length with respect to the claims of the appellant and the government on the question of whether the losses sustained by the defendant by reason of the 1951 bankruptcy of T. R. Bechtel Company and Bechtel Lumber Company were net operating losses in a business of the appellant or a loss from the sale or exchange of capital assets. The Court further instructed the jury that it was for them to determine whether the loss was an operating loss or a capital loss to the appellant. (App. xix-xxiii).

QUESTIONS PRESENTED

1. Whether the questions asked with respect to legal fees to establish that the checks and stock received by appellant constituted income and not partnership drawings or gifts to him were warranted.

2. Whether the Government properly computed appellant's tax basis in Anderson Heights stock, which appellant had received in settlement of a bill rendered for legal services.

3. When the evidence showed that there was in fact additional unreported income from the Tarman-Sherwin partnership, whether the questions propounded by the prosecutor and the instructions given by the Court with respect to this additional income were proper.

4. When Agent Neilands was called as a witness by the defense and testified fully with respect to his audit of the Tarman-Sherwin partnership, whether the defense was entitled under any theory of law to have produced the agent's report of his audit of the partnership.

5. Whether the elements of the offense in Section 7206(1) are the same as those in Section 7201.

   (a) Whether the Government was required to elect between the Section 7201 and Section 7206(1) counts of the indictment.

   (b) Whether the Government must prove a tax due and owing with respect to the Section 7206(1) charges.

(c) Whether the matters alleged in the indictment with respect to the Section 7206(1) charges were material within the meaning of Section 7206(1).

(d) Whether the Court's instructions on wilfulness with respect to the 7206(1) charges were proper.

6. Whether the Court's instructions on wilfulness and intent with respect to the Section 7201 charges were proper.

7. When appellant relied entirely on one theory of defense at the trial with respect to alleged losses and when the evidence at the trial related solely to that one theory, whether the Court was required to instruct the jury concerning any other theories about which there was no evidence in the record.

8. Whether there was any sound basis in the trial record to require the Court to hold as a matter of law that there was no tax due and owing by appellant with respect to the prosecution years.

SUMMARY OF ARGUMENT

There was no error in the questions and answers concerning legal fees earned and received by appellant during the prosecution years. The evidence was plain that appellant had in fact earned such fees during the prosecution years. The testimony with respect to legal fees was necessary in order to establish that the fees were items of income and not drawings or gifts as variously contended by appellant. So long as the evidence was probative of the issues in this case, it does not become inadmissible merely because it may also

show the commission of another offense. *Himmelfarb* v. *United States,* 175 F.2d 924, 941 (C.A. 9th, 1949), *cert. den.,* 338 U.S. 860. The Court carefully instructed the jury as to the limited purpose for which such evidence was received.

The computation of appellant's unreported income from the transfer to him of the Anderson Heights Water Company stock was based on the per-share price paid by another purchaser (Wright) at about the same time as the transfer to appellant. The government's expert carefully deducted from the income charged to appellant the proportion of the stock which represented repayment of a $4,000 loan. The price at which Wright had purchased the stock was subject to the condition that the sellers would repurchase at an $8,000 bonus. However, appellant concedes that the seller, the Beresa Corporation, was in financial difficulties at the time. Therefore, the buyer (Wright) had no collateral to look to except the stock he was purchasing. Following the transfer of the stock to appellant, the latter actually purchased more stock in the Anderson Company from one Rarey at a higher price than Rarey had paid. Moreover, Wright later in 1958 looked over the Anderson project prospect and found it to be good and offered to buy appellant's stock, but appellant was not interested in selling. Accordingly, the government was warranted in assigning a $14,000 base to this stock. This stock was transferred to appellant in settlement of a $13,250 legal fee bill; however, the government used the lesser basis of $10,000 ($14,000 less the $4,000 which represented repayment of a loan) in charging appellant with this income.

The questions asked about unreported income from

the Tarman-Sherwin partnership were warranted since appellant, his counsel, and all witnesses who had knowledge on the subject agreed that there actually was income from that source which had not been reported. In fact there was evidence of specific items of unreported Tarman-Sherwin partnership income received from dividends in the Melfort Corporation which appellant knew about and the accountant who prepared the returns did not know about and which was not reported on the partnership return or on appellant's return. The Court's instruction on the issue properly advised the jury that it could consider such evidence with respect to unreported Tarman-Sherwin partnership income "if from the evidence you are satisfied beyond a reasonable doubt that he failed to report such income."

With respect to appellant's complaint that he was prevented by the Court from showing partnership losses, the record is clear that the Court's refusal to permit cross-examination of a witness on this issue occurring during the government's case was carefully premised on the fact that the questions were beyond the scope of the direct testimony of the witness and pertained to matters discovered during post-prosecution years. As was pointed out (Tr. 320), such evidence would be material if the witness were called as part of appellant's case.

There was no error in refusal of the Court to order production of Agent Neilands' report (Court's Exhibit No. 1). This agent had conducted an audit of J. H. Tarman, Sr., a part of which included an audit of the Tarman-Sherwin partnership. However, the agent was not an investigating agent on this case. The agent's report was not admissible *per se* as evidence. *United*

States v. *Brockington,* 21 F.R.D. 104 (E.D. Va. 1957). The agent was called as a witness for the defense and testified fully as to the audit he had conducted and as to his computations. There were no questions asked of him which he failed or refused to answer. The government did not dispute the agent's testimony in any way. There was thus no principle of corroboration, impeachment, refreshment of recollection or other basis in law warranting production of the report.

The sentences on all counts being concurrent, if this Court finds that appellant's conviction on the Section 7201 charges should be upheld, it is unnecessary for this Court to consider appellant's various allegations of error with respect to the Section 7206(1) charges. *Hirabayashi* v. *United States,* 320 U.S. 81, 105 (1943).

The appellant erroneously assumes that the offense defined in Section 7206(1) is the same as that set forth in Section 7201. The offense charged in Section 7206(1) is merely an incidental step in the consummation of the offense of attempted tax evasion proscribed in Section 7201. Hence, the government, having had the right to proceed against appellant under any section or sections of the Internal Revenue Code that it selected, was not required to elect as between the 7201 and 7206(1) counts of the indictment, nor was it required, with respect to the 7206(1) counts, to prove a tax due and owing. Similarly, appellant was not entitled to an instruction that he have a tax evasion intent with respect to the 7206(1) charges. The Court's instructions as given on wilfulness as they related to the Section 7206(1) charges were proper.

The indictment alleged materiality within the meaning of Section 7206(1) with sufficient particularity. A

false statement regarding the items of appellant's income is obviously material within the purview of Section 7206(1).

There was no error in the trial court's instructions on wilfullness and intent with respect to the Section 7201 charges of tax evasion. The full and comprehensive charge by the court on that subject was proper. The appellant himself requested the so-called *Murdock* instruction which comprises substantially all of the charge complained of. Of the two decisions of this Circuit relied upon by appellant on this point, one is clearly distinguished by reason of the setting in which the instruction there held to be erroneous was given; while the vitality of the other has been virtually eliminated by a subsequent decision of this Court. Furthermore, the language of the instructions given in this case about which appellant complains was not the same as that used in the instructions given in the cases upon which appellant relies to support his contentions. From a reading of the instructions as a whole, and in context, it is clear that appellant's allegation of error with respect to the Court's charge has no merit.

There is no merit to appellant's contention that he was entitled to instructions on some other alternative theories of the defense. At the trial, there was testimony about and appellant relied on only one theory, that he was a dealer in and promoter of corporations, to support his contention that he was entitled to a carry-forward loss during the prosecution years on account of his loss on the stock of the Bechtel Corporations as a result of their 1951 bankruptcy. The Court carefully instructed the jury on appellant's theory. The Court was not warranted in charging the jury with respect to

some other defensive theory which appellant had not relied on and about which there was no probative evidence in the record.

There is no merit to appellant's final contention that the Court should have held as a matter of law that no tax was due and owing by appellant. Contrary to appellant's assertion in support of this claim (O. B. 59-65), the government through the Internal Revenue Service at no time conceded that appellant had an *operating loss* on the bankrupt Bechtel Corporation *stock* which appellant was entitled to carry forward to the years 1954, 1955 and 1956. Indeed, appellant had specifically claimed only a *capital loss* with respect to this stock loss on his 1951 and 1952 returns.

ARGUMENT

I. The Legal Fee Testimony Elicited Was Necessary in Order to Establish the Fees as Items of Income.

Appellant contends (O. B. 13-20) that the introduction of testimony and the questioning of the prosecutor with respect to the earning of legal fees during the prosecution years by appellant was error. This contention is without merit. A great deal of the unreported income in this case arose from legal fees which were not declared on appellant's tax returns. The mere fact that during a taxable year a person receives cash or checks or other things of value does not establish them *per se* as items of income to be reported on the taxpayer's income tax return. In this case, the introduction of testimony with respect to receipt by appellant of legal fees was necessary to establish these items as income and, further, to rebut appellant's contention that

some of them constituted non-income receipts such as withdrawals from a corporation or partnership.

One of the questions and answers about which appellant complains (O. B. 14-15) concerns the testimony of the witness Jack Tarman about a $500 check to appellant (Ex. 24). The Tarmans and Sherwin were in a partnership together. It was necessary to establish that this check represented income, namely payment for legal services for the Tarmans, and not a drawing from the partnership—a non-income receipt. The witness had just testified that appellant had asked for $500 for appellant's help in alleviating the intricate problems the Tarmans had had with the other owners in the Suisun Gardens project; the witness testified that appellant had asked that Tarman tell Joyce, the partnership accountant, to put the $500 in the journals and ledgers as a partnership withdrawal (Tr. 59). It was thus not clear whether the $500 check was a partnership *withdrawal* (a non-income item) or a payment from the J. H. Tarman Company on account of legal services rendered to it. Accordingly, the witness was properly questioned as to whether the payment was for services "in the nature of legal assistance" (Tr. 57).

The witness later stated that the $500 item was first put on the journal sheets as a Gwin Unit transaction and was ultimately entered on the books and records of the J. H. Tarman corporation as a legal fee and deducted as a corporate expense (Tr. 60; 96-101) and that the Suisun Gardens project for which the service was rendered was not a Tarman-Sherwin partnership project (Tr. 65). The bank account on which the check was written was the Tarman Corporation account (Tr. 96).

The necessity to definitely establish the income character of the item was made plain when appellant on the witness stand said that he considered the check either (1) as a partnership withdrawal, or (2) as a *gift* made by Mr. Tarman in appeciation of appellant's services on the Suisun matter (Tr. 785-787). Appellant never listed the $500 check as constituting partnership withdrawal, in his accounting of his partnership interests at the Santa Rosa litigation (Tr. 787-788). It would seem that if appellant had actually intended that the item be charged against him as a partnership withdrawal and believed that it had been handled in that way, and that it was not payment for legal services rendered to the Tarman Company, the item should have been listed in his accounting of his partnership interests at Santa Rosa.

Appellant additionally contends that a $1,500 check from the Tarmans was not income, on the grounds that appellant requested that it also be treated as a withdrawal from the Tarman-Sherwin partnership (O. B. 16-17). However, Jack Tarman testified that he had issued the check to appellant as payment for legal services or commission expense (Tr. 92) for appellant's services in effecting a sale by J. H. Tarman of Tarman's subdivision in Willows, California, to the Beresa Corporation and in typing up the contracts for the sale, pursuant to a telephone call he received from appellant requesting to be paid $1,500 for his services. The Tarman-Sherwin partnership had no connection with the Tarman's Willows subdivision or with Beresa, the two groups involved in the Willows subdivision sale. (Tr. 61-64; 92-95; 107.) The notation "Willows deal Beresa" was put on the check when it was returned from the bank and before it was delivered to the

accountant for preparation of the income tax returns (Tr. 93, 107) which, of course, were prepared long before the witness' testimony at this trial.

Some of the questions directed to *appellant* about which he complains (O. B. 18; Tr. 785; 805-806) were proper on another ground. When appellant took the stand, he gave a different account (Tr. 614-616; 834-836) as to his conversations with respect to the $500 and $1,500 Tarman checks than had the witness Jack Tarman (Tr. 53-66). Accordingly, the credibility of the government witness became an issue, and it was probative to cross-examine the defendant as to the details of the transaction as had been testified to by Jack Tarman.

Appellant further contends (O. B. 18-19) that he was prejudiced by questions asked with respect to legal fees paid him by Beresa. Appellant was not a stockholder or officer in Beresa, but did perform legal services for it (Tr. 204) and was advising Beresa during the prosecution years (Tr. 231). Thus, in 1955, appellant prepared and submitted a memorandum to Beresa (Ex. 40) with respect to their proposed business activity in Oregon, advising them of the legal requirements for doing business in Oregon, suggesting the advisability of using a California corporation, and offering to prepare the necessary forms for setting up the corporation which he would forward to Beresa to execute.

There were several items of income charged by the government as having been received by appellant as income from Beresa during the prosecution years, including (1) a $250 check "on account legal," (2) appellant's enjoyment of the use of Beresa's credit cards with Shell Oil Company, and (3) $10,000 worth of stock in the Anderson Heights Water Company which

was transferred to appellant in satisfaction of a $13,250 bill for legal fees owed by Beresa to appellant (Tr. 243-245).

On direct examination, the witness Reilley had said that the Anderson Heights Water Company stock was transferred to appellant in payment for legal fees (Tr. 245). The issue about which appellant now complains (O. B. 19) was actually brought up by appellant's attorney on cross-examination. Appellant's counsel had elicited from Mr. Reilley, a government witness, that the type of service performed by appellant after he went on the bench was such as arbitrating disputes (Tr. 252-253). Appellant's counsel also questioned the witness as to whether he had "found any other checks [other than the one for $250] for legal services that were paid to Judge Sherwin in 1954, 1955 and 1956." The witness replied that there were none because the total indebtedness had been wiped out by the transfer of the Anderson Heights Water Company stock (Tr. 254). In this setting, then, on re-direct, the witness was asked whether appellant performed legal services for Beresa during 1954, 1955, and 1956. The witness replied that appellant rendered services by advice and suggestions on how to conduct business, that he recalled that appellant also drew up a waiver of lien and items of that nature and that during 1954, 1955 and 1956 appellant had advised Beresa on tax matters (Exs. 40, 41; Tr. 255-259). Thus, the questions had been asked by the government on re-direct of witness Reilley to clarify his testimony.

Moreover, the need to establish the definite character of the receipt of the Anderson Heights Water Company stock as being reportable income from legal fees was shown when appellant's counsel moved to strike the

evidence with respect to this matter on the grounds, *inter alia,* that the government had not shown that the stock "constituted income to the defendant" (Tr. 524). In addition, appellant later gave two alternative explanations for nonreporting: (1) he considered this stock as a security transaction and not reportable, and (2) he did not consider receipt of stock a taxable item until it was sold (Tr. 623-626).

We believe the evidence shows another example in which appellant in effect admits earning income during the prosecution years from legal fees. Appellant was attorney for Chip Steak Company. Originally he was paid fees when he rendered bills; later he "was somewhat on a retainer on the basis of salary"; he continued on salary with the Chip Steak Company after he went on the bench. In connection with his explanation of the Chip Steak Company salary (actually reported on appellant's returns), appellant made the following statement with respect to rendering legal advice after he went on the bench: "Well, I think that any director in discusing company problems renders legal advice, but if there was anything involved taking any legal responsibility, I told them they would have to get some attorney who would be able to carry out what he advised. * * * I didn't give any legal advice on any matter that I thought might involve them in difficulty. I advised them to go to other attorneys. * * * but I didn't render any bills. My definition, of course, of practicing law or practicing medicine is either giving legal or medical advice for a compensation." (Tr. 708-712.)

The court carefully instructed the jury as to the limited purposes for which the evidence as to legal fees

was received and cautioned them to make no other use of the testimony, both during the trial (Tr. 806) and at the time the case was submitted to it (App. xi-xii):

> "I further instruct you that should you find that the defendant received fees for legal services rendered after he took judicial office, he is not here on trial for such conduct, nor is he on trial for any other act or conduct not alleged in the indictment. Any fees received by the defendant after he took judicial office, should you be satisfied that such fees were in fact received, for the purposes of this trial, are to be treated the same and no different than any other income received by the defendant from any other source. The fees and other income received, and not the source thereof, are material to this case, to the degree that you find such fees and other income go to make up the income of the defendant which was subject to tax during the years in question."

It has long been settled that evidence probative of an issue in the case does not become inadmissible because it also may show the commission of another offense. *Wood* v. *United States,* 41 U.S. 341, 360 (1842); *Strader* v. *United States,* 72 F. 2d 589 (10th Cir., 1934); *Tinkoff* v. *United States,* 86 F. 2d 868, 879 (7th Cir., 1936), cert. denied, 301 U.S. 689; *Himmelfarb* v. *United States, supra.*

We submit that there was no error in the questions asked and answers given with respect to appellant's earning of the legal fees during the prosecution years.

II. There Was No Error in the Treatment of the Anderson Heights Water Company Stock.

Appellant had performed legal services for the Beresa Corporation and had billed them for $13,250. In addi-

tion, he had loaned Beresa $4,000. In settlement of both of these obligations aggregating $17,250, Beresa transferred to appellant stock in the Anderson Heights Water Company. The total Anderson Heights capital stock had a par value of $75,000 and the actual cost to construct the Anderson Heights Water Company project was around $70,000 (Tr. 227). Mr. Wright testified that he had paid $25,000 for some of the stock pursuant to a contract to sell (Ex. 27) which called for purchase of all of the Anderson stock for $40,000; the buyers had the option to purchase only part of the stock at the proportionate price, which they exercised to the extent of $25,000 worth.

The government computed appellant's interest in Anderson on the basis of the per share cost to Wright in his purchase of the Anderson stock which had occurred only a few weeks before appellant's transaction. (Tr. 130, 470-471). Based on the Wright purchase, the value of appellant's stock in Anderson was computed at $14,000. However, the government's expert in making the computation first deducted the $4,000 due appellant on the loan, since this did not represent income. The remaining $10,000 basis was charged as income to appellant. (Tr. 470-471.) The government's expert stated that there were several ways in which the basis for this stock could be computed. It could be computed by the fair market value, which was what a willing buyer would pay a willing seller. In the absence of any history of willing buyers and willing sellers it is assumed under the Internal Revenue Code, in the absence of satisfactory evidence to the contrary, that the asset has the value of the claim. (Tr. 522-523.) In this particular case the claim would be $17,250, a $4,000 loan and

$13,250 for legal fees. Here, the government, however, took the lesser figure of $10,000 as the basis for that part of the transfer of stock attributed to appellant as income from legal fees.

Beresa was owned by the Bechtels and Reilleys (Tr. 125, 152, 167). Wright was not a stockholder in Beresa. Wright's agreement to purchase the stock for $40,000 contained two conditions: (1) an option to *appellant* to purchase the stock for $48,000, and (2) in the event appellant did not exercise his option, an agreement by the Beresa interests to repurchase the stock at the option price of $48,000 (Ex. 27). Appellant later purchased additional Anderson Heights Water Company stock from one Rarey; the latter had purchased the stock for $1,000, at the same per-share price paid by Wright (Tr. 131, 470), and appellant paid him over $1,100 for it. (Tr. 832.) Thus, appellant must have thought at about this time that the stock was worth the $17,250 which was due him since he had secured the option to purchase Wright's $40,000 stock for $48,000 and later paid Rarey a premium to secure Rarey's stock.

Wright, who stated that in 1958 or 1959 he had looked over the Anderson records and thought things were getting better, had a short discussion with appellant about buying appellant's interest in Anderson, without mentioning price, and found out that appellant was not interested in selling (Tr. 131-133; 149-150). Apparently appellant still felt in 1958 that he had a good investment in the Anderson stock.

The only collateral which Wright had received for his $25,000 investment was the Anderson stock. Appellant states (O. B. 21) that Beresa, who had guaranteed performance on the Anderson contract (Ex. 27), was

in serious financial difficulties. If it is true that Beresa was then in difficulties, Wright had to depend on the value of his Anderson stock to protect his investment. Wright was purchasing *Anderson* stock, not *Beresa* stock. Wright was not a stockholder in Beresa and was plainly dealing at arms length with Beresa in negotiating the Anderson contract at the agreed-on price.

The Court properly instructed the jury that the burden was on the government to prove that the stock had the value claimed by the government. The relevant factors for the jury to consider in determining whether the government's computation of income to appellant from receipt of the Anderson stock were fully set forth in the court's instruction (App. xii-xiii). There was no need to instruct the jury that the $4,000 must first be deducted in arriving at appellant's base for tax purposes, as contended by appellant (O. B. 23-24), because the government's expert had at all times conceded this fact (Tr. 469-471, 504) and had deducted the $4,000 before arriving at the amount chargeable as income (Ex. 69).[4]

It has, of course, been long established that it is not necessary that the government prove an evasion of all of the tax charged; it is sufficient if it proves that any substantial portion was attempted to be defeated. *United States* v. *Johnson,* 319 U.S. 503; *Gleckman* v. *United States,* 80 F. 2d 394 (8th Cir., 1935) cert. den., 297 U.S. 709; *Tinkoff* v. *United States, supra.*

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[4]When appellant made his objection to the court's instruction, the Court pointed out that under the last sentence of defendant's proposed instruction No. 40 on this issue (O.B.A. xx), (which stated that the court "specifically instruct you that you *must find*" that the transferred Anderson Heights stock "had a value in excess of $4,000."), would have automatically instructed the jury that the Anderson Heights stock was an item of reportable income, and the court stated it did not want to go that far. (Tr. 1053-1054).

In this case, the Court properly left to the jury the issue as to whether the government had proved substantial unreported income from the acquisition of the Anderson stock. (App. xii-xiii). We submit that there was probative evidence to support the jury's findings under the court's instruction that appellant received substantial unreported income in 1956 from his acquisition of the Anderson Heights Water Company stock.

III. There Was No Error in the Treatment of Income From the Tarman-Sherwin Partnership.

There is no merit to appellant's complaint (O. B. 25) with respect to the question asked by government counsel as to whether there was additional partnership income or the witness' reply that there was additional income. This question was asked on cross-examination of Agent Neilands offered by the appellant during presentation of appellant's defense. Earlier, during the government's case, appellant's own counsel had stated in the jury's presence that certain items of Tarman-Sherwin partnership income had not been included in the income tax return of appellant (Tr. 314) and had vigorously pressed to be allowed to cross-examine Mr. Joyce on this issue (Tr. 310-330). The Court's refusal to permit such cross-examination at that juncture was based on its ruling that counsel could not go beyond the scope of the direct examination of Joyce, which had related solely to the preparation of appellant's returns (Tr. 315, 322, 328-330). The Court stated however that this matter was a proper subject to be brought out on appellant's case (Tr. 322). Moreover, the question about which appellant now complains was not objected to by appellant's counsel at the time it was asked (Tr.

576-577), which is hardly surprising in light of appellant's earlier efforts to secure the admission of such testimony. Nevertheless, it is now too late to be assigning this question and answer as error (Specification No. V).

Appellant's assertion (O. B. 27; see also O. B. 25-26) that the undisputed evidence in the case showed that in no way could appellant be held responsible for any unreported income from the Tarman-Sherwin partnership is not correct. It is true that appellant's income from the partnership which was reported on appellant's returns was taken by the accountant Joyce from the partnership returns. However, appellant had 202 shares of Melfort Company stock which he kept in his daughter's name; 100 shares of this stock actually belonged to the Tarman-Sherwin partnership (of which appellant had a 50% interest) and 102 shares belonged to appellant individually (Ex. 34; Tr. 203, 472-474). The accountant for the Tarman-Sherwin partnership (Joyce) who also prepared appellant's tax returns for the prosecution years testified that he did not know that the partnership owned stock in Melfort or that the partnership had received any dividends from the Melfort Company. Accordingly, the partnership dividends from Melfort had not been included in the partnership return or in appellant's individual return as income from the partnership (Tr. 290-292).

Nor was there error in the Court's instruction on the issue. The Court carefully advised the jury that it could consider evidence of unreported income with respect to the Tarman-Sherwin partnership providing "from the evidence you are satisfied beyond a reasonable doubt that he failed to report such income." (O.B.

25-26, App. xiv). As the Court pointed out when appellant objected to the instruction (Tr. 1130-1131), it had conditioned the Tarman-Sherwin partnership instruction on the premise: "if you so find" that there was any unreported income. The instruction was clearly warranted in light of the evidence.

There is no merit to appellant's further contention (O. B. 26) that the Court would not permit evidence of Tarman-Sherwin partnership losses to be introduced. At the time the offer of proof was made on this issue it was specifically stated by appellant's counsel to be as to after discovered evidence not known for some time after the returns for the prosecution years were prepared. The Court carefully noted that it denied the motion to elicit this testimony on the grounds (1) that counsel had emphasized that this was after discovered evidence, and (2) the proof was tendered as part of the cross-examination of this witness whose testimony on direct had been strictly limited to the preparation of appellant's returns (Tr. 328-329). As was pointed out (Tr. 320), the witness, appellant's own accountant who prepared his returns, could be recalled on appellant's case, at which point the questions would be material. *Chevillard* v. *United States,* 155 F. 2d 929, 934-935 (9th Cir., 1946).

No proof was offered on appellant's case as to any alleged Tarman-Sherwin partnership losses,[5] although the accountant-bookkeeper for the partnership (Joyce),

[5]We are at a loss to understand appellant's position (O.B. 26) that he wanted to go into partnership *income* for the purposes of determining *losses.* At the trial, appellant similarly contended that he was attempting to prove that the omission on appellant's return of certain partnership income, namely the Plaza Building, constituted a loss to the defendant (Tr. 322, 328). Apparently appellant contends that he should be entitled to a loss on his tax return for income that he never reported in the first place.

the person whom appellant had attempted to cross-examine about it, was available as a witness. The partnership records were, of course, subject to subpoena. Appellant's present accountant (Moran) who had just recently audited the Tarman-Sherwin partnership was put on the stand by appellant, and testified as to his computation of losses as a result of the 1951 Bechtel Corporation bankruptcy (Tr. 886-906), but said nothing about any alleged partnership losses he found in the audit.

IV. The Refusal of the Court to Order the Revenue Agent's Report Produced Was Not Error.

Revenue Agent Neilands was called as a witness by the defense. In 1958 and 1959 he had conducted an audit with respect to J. H. Tarman, Sr., in connection with which he had audited the Tarman-Sherwin partnership (Tr. 545, 561). He was not an investigating agent in connection with bringing the indictment in this case. Appellant had asked for production of the agent's report prior to trial and during the course of Neilands' testimony at the trial (Tr. 561). The Court refused to require pre-trial production on the grounds that the report was not evidence and was not producible under Rules 16 and 17(c), F.R.Cr.P., citing *United States* v. *Brockington, supra* (Tr. 528). The Court sealed the report and marked it Court's Exhibit No. 1. The Court likewise refused production of the report during the trial on the same grounds (Tr. 561-562); however, the Court had advised appellant that if the witness needed these workpapers and report to refresh his recollection they would be produced (Tr. 529-530). No such occasion arose.

As a witness for the defense, Agent Neilands identified the Tarman-Sherwin partnership balance sheet (Ex. G) which he had prepared (Tr. 550). He testified as to how he had arrived at the values used on the balance sheet (Tr. 551-560). His balance sheet listed the fair market value of the stock of the Bechtel Company and its subsidiaries at $300,000 (Tr. 556, 560) and the cost of the Plaza Building at $155,334 (Tr. 557, 564) and its fair market value at $200,000 (Tr. 559). Neilands testified that he arrived at the $300,000 fair market value of the Bechtel Corporation from appellant's own appraisal (Tr. 567). Neilands further testified that appellant's basis in the Bechtel Company stock was $58,320 to be used when and if appellant sold the stock or sustained a loss on it (Tr. 573-574). This figure was arrived at by allocating to the Bechtel stock a proportionate share of the over-all cost of the Tarman-Sherwin partnership assets of which this was a partial liquidation (Tr. 570-572). On his 1951 returns (Exs. 63, 64), appellant himself had used a $60,000 basis for the Bechtel stock when he claimed a capital loss. The agent stated that he agreed with appellant's $60,000 figure as it was close to the agent's $58,000 figure (Tr. 575-576). Neilands' testimony thus established precisely the basis he used in computing appellant's interest in the Bechtel Corporation. Appellant's complaint (O. B. 28-29) that he needed the agent's report for this purpose is therefore without merit. The agent was also specifically asked whether or not he took into consideration cash and other contributions to be made by appellant. The agent stated that he had not, and set forth the reasons why he had not done so. The agent described fully what he had considered in arriving at his valuation of appellant's

Bechtel interests (Tr. 578-585). Accordingly, there is no ground for appellant's complaint (O. B. 30-31) that he needed the agent's report to establish the basis of the agent's explanation of his computation of the loss.

The facts about which the agent testified were not disputed by the government and there was thus no need to rehabilitate the witness with corroborative evidence from his report. Moreover, appellant clearly could not demand production of the report to impeach his own witness. Nor did appellant attempt to show hostility of the witness or surprise so as to warrant suspension of the ordinary rules for impeachment. There was no showing that the witness needed the document to refresh his recollection. And under no theory could the report of the agent as such be admissible in evidence, as it had no evidentiary value standing alone.

There is no merit to appellant's contention (O.B. 30-31; see also O.B. 27) that he was crippled in making his defense by the non-production of the report. As we have shown above, the agent actually testified as to any aspects of his investigation about which he was questioned. As we said in point III, *supra,* the accountant (Joyce) who had prepared appellant's income tax returns (Tr. 281) was the person who kept the partnership records (Tr. 301). He was available as a witness for the defense but was not called by appellant, and the partnership records were subject to subpoena by the appellant. Furthermore, appellant did produce as a witness his own accountant (Moran) whom he had engaged to conduct an audit of the Tarman-Sherwin partnership (Tr. 924) and who testified extensively to appellant's interest and losses in the Bechtel Corpora-

tions (Tr. 872-889) and as to his computation of losses on the Tarman-Bechtel interests (Tr. 895-909).

Appellant was clearly not deprived of any right by the non-production of the report; he was not entitled to it under any theory of law. We submit that the Court was correct in ruling that the agent's report should not be produced.

V. The Court's Rulings and Instructions With Respect to Counts Four, Five, and Six Concerning Section 7206(1) Were Correct and Did Not Constitute Error.

The prison sentences assessed on all six counts are to run concurrently, and the sentences assessed under the Section 7206(1) charges are no greater than the sentences under any one of the Section 7201 charges. For this reason, it is unnecessary for this Court to review the convictions on the Section 7206(1) charges and the contentions made by appellant with respect to those charges, provided it finds that the conviction of appellant can be upheld on any of the 7201 charges. *Lawn* v. *United States,* 355 U.S. 339, 362 (1957); *Hirabayashi* v. *United States, supra*; *Pinkerton* v. *United States,* 328 U.S. 640 (1946); *Sinclair* v. *United States,* 279 U.S. 263, 299 (1929); *Cohen* v. *United States,* 201 F.2d 386, 393 (9th Cir. 1953), *cert. den.*, 345 U.S. 951. We believe it is clear that there was no error with respect to the conviction of appellant on the 7201 charges.

However, since appellant has made divers allegations and has devoted a great number of his assignments of error to his contentions with respect to the Section 7206(1) charges (O. B. 32, 33-35, 42-48, 48-51, 51-55), we have nevertheless attempted to answer each of the separate contentions made by him. Because many of

appellant's contentions are intertwined and overlapping, they will be considered together.

General

The gist of the offense described in Section 7206(1) is the wilful subscription by a taxpayer of a return which is made and signed subject to the penalties of perjury, when the person signing the return knows the return not to be true and correct as to every material matter.

In creating the forerunner to Section 7206(1) Congress was retaining the effect of the perjury statute which became inapplicable to tax returns by reason of the coincidental elimination of the requirement that such returns be made and signed under oath. *Cohen* v. *United States, supra.*[6]

Enactment of Section 7206(1) accomplished no limitation on the allegation of the filing of a false return as a means of attempted evasion under Section 7201 because the offense of making and subscribing is distinct

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[6]The statute referred to in *Cohen* is Section 3809(a) of Title 26, United States Code (Section 3809(a) of the Internal Revenue Code of 1939) which Section read as follows:

§3809. Verification of returns; penalties of perjury.

"(a) Penalties. Any person who wilfully makes and subscribes any return, statement, or other document, which contains or is verified by a written declaration that it is made under the penalties of perjury, and which he does not believe to be true and correct as to every material matter, shall be guilty of a felony, and, upon conviction thereof, shall be fined not more than $2,000 or imprisoned not more than five years, or both."

Section 7206(1) Internal Revenue Code, 1954 superseded Section 3809(a), Internal Revenue Code, 1939. The description of the offense is the same, but the penalty was changed.

Enactment of Section 3809 was accompanied by express repeal of certain other laws including Section 145(c) of Title 26, United States Code (Section 145(c) of the Internal Revenue Code of 1939) which provided as follows:

§145. Penalties

* * * * *

"(c) Any individual who willfully makes and subscribes a return which he does not believe to be true and correct as to every material matter, shall be guilty of a felony, and, upon conviction thereof, shall be subject to the penalties prescribed for perjury in section 125 of the Criminal Code."

from a filing and the offense of attempted evasion by means of such filing. *Taylor* v. *United States,* 179 F.2d 640 (9th Cir., 1950), cert. den., 339 U.S. 988.

The government was entitled to proceed against the appellant under several sections of the Internal Revenue Code. It could and did charge him with attempt to evade his income tax in violation of Title 26 U.S.C., Section 7201. It could also, and it did, charge him with a violation of the section relating to false statements, Title 26 U.S.C., Section 7206(1). The choice lies with the government and it is not the privilege of the appellant to say how and under what section or sections the government should proceed. "Congress may make each separate step in a prohibited transaction a separate offense." *Taylor* v. *United States, supra; Catrino* v. *United States,* 176 F.2d 884 (9th Cir., 1949). In *Albrecht* v. *United States,* 273 U.S. 1, 11, (1927), the Supreme Court said:

> "There is nothing in the Constitution which prevents Congress from punishing separately each step leading to the consummation of a transaction which it has power to prohibit and punishing also the completed transaction."

The Supreme Court has held that in tax matters acts which overlap to some extent can be prosecuted or punished separately. See *United States* v. *Noveck,* 273 U.S. 202, 206 (1927); *United States* v. *Beacon Brass,* 344 U.S. 43 (1952).

Appellant contends (O. B. 33) that Section 7201 charges the same offense as set forth in Section 7206(1), and that the proof of the offense is, likewise, the same. This, of course, is not the case.

The purpose of Section 7206(1) is to impose the penalties for perjury upon those who wilfully falsify their returns *regardless of the tax consequences* of the falsehood. On the other hand, Section 7201 condemns wilful attempts to evade or defeat taxes "in any manner," and one manner is by the wilful filing of a return known to be false in some material respect. While proof of an offense under Section 7201 may also prove an offense under Section 7206(1), it must in addition indicate an intent in some manner to evade or defeat a tax which is due.

Appellant's argument (O. B. 33-35) that it was error for the Court to fail to require the government to elect as between the first three counts of the indictment and the last three counts rests upon the fallacious assumption that an indictment charging violations of Sections 7201 and 7206(1) defines crimes the elements of which are identical. The scope of the two sections is different.

The offense charged in the latter three counts is an incidental step in consummation of the completed offense of an attempted evasion of tax by means of a false and fraudulent return charged in the first three counts of the indictment. See *Gaunt* v. *United States,* 184 F. 2d 284, (1st Cir., 1950), *cert. den.,* 340 U.S. 917.[7]

Appellant alleges (O. B. 32) the indictment was insufficient on Counts 4, 5 and 6 because materiality was not charged; and that the trial court should have required the government to state how the false statements in Counts 4, 5 and 6 were material (O. B. 35).

Where it is required, materiality must be alleged in the indictment or sufficient facts must be alleged in the

[7]In *Gaunt*, Section 145(c), the forerunner of 7206(1), was under consideration. See footnote 6, *supra.*

indictment from which materiality may be inferred. Both these tests were met in the indictment in this case. Counts 4, 5 and 6 are substantially in the words of 7206(1) and are sufficient. See *United States* v. *Accardo,* 298 F. 2d 133 (7th Cir., 1962), reversed on other grounds.

Since the Government chose to proceed under Section 7206(1), the question of materiality of statements in appellant's tax returns should be decided by reference to Section 7206(1) and not by an interpretation of what is material under some other section. A statement in an income tax return concerning the amount of income is obviously material to the contents of that return. When the appellant failed to report all of his income on his returns, the statements in each of said returns with respect to his income were false with respect to a matter material to those returns, and material insofar as the governmental agency with which the returns were filed was intimately concerned.

The Internal Revenue Service must have a complete and truthful disclosure to audit a return. The United States and its agency, the Internal Revenue Service, was entitled to have on the date the return was filed the correct amount of appellant's income. The question with respect to materiality is whether or not appellant's statements were calculated to induce action or reliance by an agency of the United States Government. See *Brandow* v. *United States,* 268 F. 2d 559 (9th Cir., 1959). Materiality in matters of this kind lies in the

> ". . . intent to protect the authorized functions of governmental departments and agencies from the

> perversion which might result from the deceptive practices described."

United States v. Gilliland, 312 U.S. 86, 93 (1941).

Appellant argues that in a Section 7206(1) prosecution the government must prove, among other things, that a tax was due and owing. He relies on *Poonian* v. *United States,* 294 F. 2d 74 (9th Cir., 1961), to support this allegation, but that case does not hold that a Section 7206(1) conviction regarding an income tax return cannot be had without a showing of a tax due and owing. Appellant's contention here that *Poonian* stands for the proposition that a tax due and owing must be found to sustain a Title 18 U.S.C., Section 1001 (the statute being considered in that case) false statement conviction, and, therefore, by parity of reasoning, a 7206(1) conviction is, at best, a strained interpretation of dicta appearing in the *Poonian* opinion. The language presumably relied on by appellant in the *Poonian* opinion is as follows (p. 76):

> "This Court refuses to construe the statute in question [1001] so as to permit a taxpayer to be convicted for reporting more taxes than he rightfully owes, regardless of what his intentions may have been."

This language was not necessary to the decision in *Poonian,* which case reversed a conviction under Section 1001 because there was a fatal variance between the government's proof and the charging language of the indictment.

The further answer to appellant's arguments (O. B. 42-48) on requirements of proof of "tax due and owing" insofar as it relates to Section 7206(1) is governed by

what was heretofore said with respect to appellant's contentions regarding election between counts. *Supra,* p. 39-41.

Section 7206(1) makes it a felony merely to make and subscribe a tax return without believing it to be true and correct as to every material matter whether or not there was a tax liability due.

What has been said with respect to appellant's contention that a tax due and owing must be proved to sustain a charge under 7206(1) is dispositive of his analogous contention that in order to find wilfulness under Counts 4, 5 and 6 of the indictment appellant must have had a tax evasion intent (O. B. 51-55). The standard of wilfulness under these three counts is as described by the trial judge (App. xxviii). The wilful element is the deliberate and knowledgeable making and subscribing of a false statement in a tax return such to be determined from the evidence. That element does not require a finding that the purpose in so doing was to evade or defeat tax.

Appellant also contends (O. B. 48-51) that he was entitled to have given his proposed instructions 29, 30 and 35. As we read these proposed instructions, appellant would require that before the jury could find that there was unreported income it must first take into account any alleged additional deductions from gross income (such as an operating loss). This argument is merely another side to appellant's contention that there must be a tax due and owing. Section 7206(1) proscribes the making of a statement which the taxpayer "does not believe to be true and correct as to every material matter." It is a false statement statute. Appel-

lant was charged with subscribing to tax returns which he knew did not disclose certain items of income, namely, legal fees, commissions, partnership receipts, interest and dividends. It was the falsity of the return by not disclosing these items of income which is the gist of the charge. *United States* v. *Rayor,* 204 F. Supp. 486 S.D. Cal. 1962). Accordingly, whether appellant had offsetting losses against the unreported income is irrelevant to the charge. The question of offsetting deductions would be necessary for the jury to consider only if the issues were whether there was a tax due and owing, which as we have said above is not a consideration in a Section 7206(1) prosecution.

VI. The Court's Instructions on Wilfulness and Intent Did Not Constitute Reversible Error.

The appellant contends that the Court's instructions on wilfulness[8] constitute reversible error (O. B. 36-39). He further claims (O. B. 39-41) that another portion of the Court's charge bearing on the question of intent was erroneous. Questions presented by these two separate assignments of error will be treated together.

Specifically, two paragraphs of the Court's charge on "wilfulness" are challenged (O. B. 36-37). They are as follows:

> "You are instructed that in common, everyday speech 'wilful' denotes an act which is intentional, knowing or voluntary, as distinguished from accidental; but when it is used in a criminal statute, where one of the elements is a specific intent to

[8]This does not include appellant's separate contention that with respect to Counts 4, 5 and 6 the Court's instruction on wilfulness was error.

> defraud, it has a somewhat different meaning. It generally means an act done with a bad purpose, without justifiable excuse. The word wilful is also used to characterize a thing done without ground for believing it is lawful." (App. xviii.)
>
> "If a taxpayer honestly believes that he has paid all the taxes he owes, he is not guilty of criminal evasion. But if he acts without reasonable ground for belief that his conduct was lawful, it is for you to decide whether he was acting in good faith or whether he intended to evade the tax." (App. xxiii-xxiv.)

The first of these two paragraphs was requested by appellant himself (Tr. 1032, 1057) and represents, word for word, the first paragraph of his requested instruction No. 19 (App. xxxviii).

Appellant says the above is the so-called "Murdock" instruction and that this instruction has been disapproved by this Court on many occasions (O. B. 37). *United States* v. *Murdock,* 290 U.S. 389 (1933). In *Murdock,* the Supreme Court had before it the question of whether a wilful refusal to supply information meant a voluntary intentional refusal as the trial court had charged, or whether it meant something more. In holding that in a criminal statute it did mean something more than knowing or non-accidental, the Court set forth five definitions of wilful. The trial court here, in the last sentence of the second paragraph set forth above, used but one of the several definitions supplied by the Supreme Court in *Murdock.*

Although appellant did not request the second paragraph of the instruction above set forth, language contained therein:

"* * * But if he acts without reasonable ground for belief that his conduct was lawful * * *"

is the same in substance, and merely a restatement of the last sentence of the appellant's requested instruction. Consideration, then, of appellant's requested instruction would suffice to respond to his argument on this point.[9]

Apart from the fact that the instruction on wilfulness was requested by the appellant himself, the Supreme Court found no error in an instruction similar to the one here involved, but which, in fact, used more of the so-called *Murdock* definitions of wilful.[10]

Appellant claims that in *Bloch* v. *United States,* 221, F. 2d 786 (9th Cir., 1955) this Court disapproved the instruction given here. On many separate occasions the jury was told in the Court's comprehensive charge on intent and wilfulness that the intent requisite to conviction entailed an intentional evasion of outstanding tax liability (App. xvi, xvii, xxiv, xxv, xxvi). That was not done in *Bloch.* In the case at bar the jury was not told separately that under the offense charged, wilfully meant filing a false return with a "bad purpose or without justifiable excuse." Similarly they were not told separately that if the defendant acts "without reasonable grounds for belief that his conduct was lawful" he

[9]Those portions of the instruction not requested by appellant and which do not restate the portion of his requested instruction are beneficial to appellant and could not be considered erroneous.

[10]In *Friedberg* v. *United States,* 348 U.S. 142, (1954) affirming an income tax evasion conviction under Section 145(b) of the Internal Revenue Code of 1939, the predecessor to Section 7201, the Supreme Court found no error at all in the trial Court's instructions which had been approved by the Court of Appeals. *Friedberg* v. *United States,* 207 F.2d 777, (6th Cir., 1953). The trial court's pertinent instructions on wilfulness in *Friedberg* were (Record p. 648):

"In this connection the Court instructs you that the word 'willful' means not only intentional or knowing, but 'done with a bad purpose . . . without justifiable excuse . . . stubbornly, obstinately, and perversely.'"

intended to evade the tax. The description of mental state which the trial court gave in its instructions to the jury came within the framework of instructions which taken as a complete unit told the jury that, to be found guilty, appellant must have wilfully intended to evade his true tax liability. The instruction in question should not be isolated from the charge as a whole. *Bateman* v. *United States,* 212 F. 2d 61 (9th Cir., 1954).

In isolating the two paragraphs from the general context of the charge on wilfulness in the instructions as a whole, appellant carries to unreasonable lengths his argument for reversal of this case on the ground of erroneous instructions on that issue.

This Court has on previous occasions found no error in this instruction given by the court and requested by appellant. In fact in other cases in this Circuit, a similar instruction which was found not to be erroneous was more detailed in the particular "*Murdock* language" complained about by the appellant. (O. B. 36-37.) In *Himmelfarb* v. *United States, supra,* and *O'Connor* v. *United States,* 175 F. 2d 477 (9th Cir., 1949), this Court approved an instruction similar to the one complained of here. There is only one case which seems to hold that the *Murdock* description of wilfulness under Section 7201 is error. *Forster* v. *United States,* 237 F. 2d 617 (9th Cir., 1956).

In *Forster v. United States, supra,* the so-called *Murdock* instruction, not given in the original charge to the jury, was given to the jury on its second day of deliberation when the jury returned to the courtroom and asked for further instruction on the subject of wilfulness. The Court stated at that time to the jury (p. 620):

"Now to supplement that, as I say again, I am going to give you, in substance the same matter.

"When used in a criminal statute—that is, the word 'wilfull' or 'wilfully'—when used in a criminal statute it generally means an act done with a bad purpose, without justifiable excuse, stubbornly, obstinately, perversive."

"The word is also characterized—employed to characterize a thing done without ground for believing it lawful, or conduct marked by reckless disregard whether or not one has the right so to act."

This Court in the *Forster* case at page 621 stated:

"Reluctantly this Court has concluded, principally on the authority of *Spies* v. *United States,* 317 U.S. 492, (1943) that the case must be reversed because of the second part of the instruction. It is a close decision. But the instruction with its variegated alternatives of wilfulness here occurred at too critical a time. In the posture it entered it came into too bright a light. It did not run a long chorus line. Here to let it stand would be to endorse the doubtful proposition that jurors disregard the instructions anyway."

Much of the condemned *Forster* instruction was asked for here by the appellant. Second, the context in which the *Forster* instruction was given differed materially from the context here.

It is novel indeed for appellant to urge this Court to entertain the notion that an instruction requested by him should be the grounds for reversing a conviction when he now decides that that which he requested was not

proper.[11] Apart from that, however, it is clear that in view of prior rulings by the Court and by the Supreme Court the instructions on wilfulness and intent were not error.

The appellant further contends (O. B. 39-41) that another paragraph of the trial court's instruction on intent was erroneous. In the course of its detailed charge the Court instructed the jury that to convict they must find that appellant acted with a specific intent to evade the tax. (App. xvi.) Appearing among those instructions was the following (App. xi):

> "It is reasonable to infer that a person ordinarily intends the natural and probable consequences of acts knowingly done or knowingly omitted, so unless the contrary appears from the evidence, the jury may draw the inference that the accused intended all the consequences which one standing in like circumstances and possessing like knowledge should reasonably have expected to result from any act knowingly done or knowingly omitted by the accused."

This sentence is assigned as reversible error affecting substantial rights because, appellant claims, the trial court told the jury in effect it could draw the conclusion that the appellant had intended to defeat or evade his taxes from the mere fact that he filed an incorrect income tax return. This argument has no merit. The appellant states (O. B. 40) that this Court has specifically

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[11]Rule 30 F.R. Crim. Proc.—Instructions.

". . . No party may assign as error any portion of the charge or omission therefrom unless he objects thereto before the jury retires to consider its verdict. . . ." Here we do not have a party failing to object to the court's own instruction or one offered by the other party; but rather, appellant now assigns as error his own requested instruction which was never withdrawn, which the Court announced twice would be given (Tr. 1032, 1057) and which was given.

disapproved the "natural and probable consequences of his acts" instruction in *Bloch* v. *United States, supra,* the only case relied on by appellant on this point. The instruction to which appellant refers in the *Bloch* case was in language dissimilar and substantially different from the language of the instruction by the trial judge in this case. The language found to be erroneous in the *Bloch* case was as follows (p. 788):

> "The presumption is that a person intends the natural consequences of his acts, and the natural inference would be if a person consciously, knowingly and intentionally did not set up his income and thereby the Government was cheated or defrauded of taxes, that he intended to defeat the tax."

In *Legatos* v. *United States,* 222 F. 2d 678 (9th Cir., 1955) and *Bateman* v. *United States, supra,* this Court had before it for consideration an instruction similar to that given in *Bloch,* and which, as in *Bloch,* was in language quite different from the instruction complained of here. In *Legatos,* decided after *Bloch,* this Court concluded that considered as a whole the Court's instructions on intent and wilfulness clearly and directly stated the law and were not such as to mislead the jury. The Court distinguished the *Legatos* case from the *Bloch* case, where, it was noted, the effect of the Court's instruction considered as a whole was not discussed.

In *Legatos, supra,* this Court said (p. 687):

> "* * * in *Bateman* v. *U.S.,* 212 F. 2d 61, 69, this Court came to the conclusion that an instruction in a tax evasion case that 'the law presumes that every man intends the natural and probable consequences

> of his own voluntary acts' was not prejudicially erroneous for the reason that, considered as a whole the trial court's instructions on intent, 'correctly stated the law, were plain and understandable, and left no room for doubt in the minds of the jurors.' "

It is submitted that here the same reasoning should apply. Whatever vitality *Bloch* had has been virtually extinguished by this Court's decision in *Legatos.*

Appellant refrains from any reference to the paragraphs of the Court's charge directly prior to and directly following the paragraph complained of (App. x-xi). Upon a reading of those three paragraphs together it is clear that in this portion of his charge the Court was instructing the jury on the proof of intent in general. It was later that the Court instructed on wilfulness insofar as it specifically related to the charge of tax evasion, Section 7201, and the first three counts of the indictment. (App. xvi-xviii, xxiv-xxvi.)

It is most unrealistic for appellant to "lift" the single paragraph from its immediate context of the preceding and following paragraphs and say that it alone is erroneous; and to isolate it from the full charge of the court on intent and wilfulness that was given later serves only to further compound the unsoundness of appellant's approach to this issue.

The word "infer" in the instruction given by the Court as distinguished from the word "presume" makes the two instructions, apart from any other consideration, manifestly different. As was stated by the Court of Appeals in *Grayson* v. *United States,* 107 F.2d 367 (8th Cir., 1939), holding a similar instruction not to be prejudicial, p. 370:

> "The use of the words 'presume' or 'presumption' in this connection is not to be approved. No doubt *inferences* as to intent may be gathered from subsequent acts and conduct, but no *presumption* of the law follows to invade and restrict the province of the jury." (Emphasis supplied.)

The question of the particular intent was not treated as a question of law here, but as a matter to be submitted to and resolved by the jury.

The instruction here at issue did not have the effect of giving to the jury a conclusive presumption on the question of intent which other evidence could not overcome, nor of injecting into the case an element of presumptive intent condemned in *Bloch*. The instruction in question did not operate to withdraw the question of intent from the jury or in any way inhibit their consideration of that issue.

Furthermore, in the *Bloch* instruction the court condemned *inter alia* the following language (p. 788):

> "* * * if a person did not set up his income. * * * and the Government was cheated or defrauded of taxes, that he intended to defeat the tax."

In the instruction being considered here there is no mention of "setting up income," or "cheating or defrauding the government." This instruction was merely part of the Court's general instruction. The difference in language of the two instructions, above, is sufficient to distinguish *Bloch* from this case.

In short, appellant claims that isolated portions of the trial court's instructions on wilfulness and intent, some of which he requested, constitute reversible error;

and in support of this contention relies on two of this Court's decisions. He disregards the fact that the language of the instructions complained of here is manifestly different than in these two cases; that the force of the *Bloch* case has been nullified by a later decision of this Court; that instructions cannot be isolated but must be read as a whole; and ignores the obviously peculiar context and circumstances in which the instructions held to be erroneous in the *Forster* case were given.

The Government respectfully submits that the trial court's charge on wilfulness and intent was not erroneous.

VII. There Is No Merit to Appellant's Contention That Additional Instructions Should Have Been Given to Set Forth Alternative Theories of the Defense.

Appellant presented only one theory to support his contention that no tax was due and owing for the prosecution years. His sole contention was that he had an operating loss in 1951 from the bankruptcy of the T. R. Bechtel Company and the Bechtel Lumber Company, and that he was entitled to carry this loss forward and that this would wipe out any tax due and owing for the prosecution years. Appellant's contention was that the Bechtel bankruptcy resulted in his stock in these corporations becoming worthless, and that this was a net operating loss from the operation of a business (not a capital loss). The basis of the net operating loss contention was that appellant claimed that he was engaged in the business of promoting corporations, and that when the Bechtel corporations failed he had an operating loss in his business of promoting corporations.

In support of his contention, appellant produced his

own accountant-expert on the witness stand to testify (in answer to an hypothetical question) that if the appellant was a promoter and dealer in corporations and had sustained the losses that appellant claimed he had sustained on the Bechtel bankruptcy in 1951, appellant would have an operating loss to carry forward in the prosecution years and there would be no tax due for any of these prosecution years. (Tr. 937-939.) The expert was not asked for his opinion as to what the tax would be under any other theory. The expert categorically told the Court that his opinion was predicated upon the assumption that the defendant was engaged as a promoter of corporations. (Tr. 964.)

Moreover, with respect to this issue, appellant's counsel cross-examined the government's expert-accountant only as to the effect on his computation if the appellant were a dealer in or promoter of corporations when he had his 1951 loss. (Tr. 488-499.) Appellant's other trial counsel said at the conclusion of the government's case and at the opening of the defense's case that it was their contention that a loss would be deductible because appellant was in the business (Tr. 535-536). Appellant's defense when he was on the stand was that he had filed a claim on his 1951 tax return that in connection with the Bechtel bankruptcy he had an operating loss as a promoter of corporations (Tr. 631) and that in 1954 he had been asked by the Internal Revenue Service to substantiate this claim on the 1951 return that he was in the business of promoting corporations (Tr. 630). Appellant testified extensively as to his activities with respect to the corporations purporting to show that he was primarily engaged in the business of promoting corporations (Tr. 637-638) but gave no testi-

mony to support any other theories of carry-forward operating losses. Appellant's counsel stated to the Court that his purpose was to establish two facts: "that the defendant was in the trade and business of dealing in corporations, and that all these corporations sustained losses which as a consequence he sustained as an operating loss" (Tr. 657). The record is clear that appellant's contention that he was entitled to an operating loss carry-forward was based solely on the claim that he was in the business of promoting corporations, and no other.

The Court fully instructed the jury on appellant's operating loss carry-forward contention based on appellant's claim that he was a dealer and promoter of corporations. (App. xix-xxiii.)

There was no probative evidence to warrant appellant's proposed instruction 26 (O. B. 56) that when a corporation was a mere dummy created solely as a protection against creditors or without any function other than as a receptacle for title the loss is a [carry-forward operating] loss of the taxpayer [rather than a capital loss]. Thus, appellant testified that the T. R. Bechtel Corporation was engaged in building houses in subdivisions (Tr. 634); one of the additional corporations formed, the Bechtel Lumber Company, had a lumber mill to supply lumber for the subdivisions (Tr. 638-639); twenty-three affiliated corporations were formed which were associated in the same general enterprise (Tr. 634); the affiliated corporations were set up to carry out the building of particular subdivisions (Tr. 662-663). The reasons for forming these subsidiary or affiliated corporations were to obtain the lower tax

rates where there are multiple corporations and also so that if any difficulties in financing one tract of houses placed with one subsidiary corporation were experienced, this would not impede the development of another tract being developed by another subsidiary corporation (Tr. 696-697, 702-704). It is plain therefore that the Bechtel family of corporations were performing the functions for which they were organized. There was thus no basis in the record for the proposed instruction.

Furthermore, there is no basis for appellant's contention (O. B. 58-59) that he was entitled to an instruction that the jury could have found a carry-forward operating loss on the Plaza Building on the grounds that appellant had suffered a loss because this partnership asset had been assigned to Tarman in an opinion of the Santa Rosa court. The evidence was clear that the ownership of the Plaza Building was still in dispute and that the litigation had not been concluded. The accountant for the Tarman-Sherwin partnership said so; appellant's counsel had said so (Tr. 339, 563); Revenue Agent Neilands said so (Tr. 563); appellant's expert at the trial who also had been engaged to do appellant's accounting at the Santa Rosa trial with respect to the Tarman-Sherwin partnership (Tr. 943) said so (Tr. 946). Appellant himself specifically stated that the Santa Rosa suit was still pending; that there had been a tentative opinion (Ex. I) of that court finding that the Plaza Building was the property of Tarman, but that the court had indicated that it would not make further findings until it had resolved further issues and had held further hearings and accordingly no formal judgment had been signed (Tr. 621-622).

Appellant testified that as a consequence of the Court's order, the Plaza Building remained in a status quo, namely in the possession of the Tarmans, subject to any future orders (Tr. 630). Appellant further testified that he at all times claimed a half interest in the Plaza Building (Tr. 854-855). He stated that the building grossed income of some $70,000 per year and had a net income of some $30,000, and if it were finally decided that this was still a partnership asset he would have to file amended returns in order to declare this income. (Tr. 665-666, 672, 682-683, 855; see also Tr. 340.) Thus, until there is a final disposition of the Plaza Building, appellant clearly could not claim he had an alleged loss on it. Indeed, if contrarily, it were adjudicated that appellant still has a half-interest in the Plaza Building, it would appear that he had underreported his partnership income by some additional $15,000 for each of the prosecution years. Accordingly, there is no evidence in the record which would warrant the Court in instructing the jury that appellant had suffered a loss on the Plaza Building.

In sum, we submit that the Court was not warranted in giving additional instructions on other theories which appellant had not relied on at trial and about which there was no probative evidence introduced at the trial.

VIII. There Is No Substance to Appellant's Contention That the Court Should Have Held That No Tax Was Due and Owing as a Matter of Law.

Appellant contends (O. B. 62-64) that there had been an administrative determination by the Internal Revenue Service that appellant had an operating loss in the years 1954, 1955 and 1956 resulting from his stock loss

in the 1951 bankruptcy of the Bechtel Corporations.[12] This contention is not only contrary to the law governing such matters, *United States* v. *Hardy,* 299 F. 2d 600, 605-606 (4th Cir., 1962), it is also contrary to the evidence here.

As we have shown *supra,* p. 14, the Internal Revenue Service had allowed appellant a 1950 carry-back operating loss resulting from a $21,115 *loan* he had made to the bankrupt Bechtel Corporation; this claim was allowed on what was called a tentative adjustment or a "quickie claim." Such a claim is allowed merely on the taxpayer's statement without examining the return or without additional investigation. (Tr. 1009.) With respect to the loss on appellant's *stock* in the bankruptcy of the Bechtel Corporations, appellant claimed in his correspondence with the Internal Revenue Service (Ex. 75) and on his 1951 and 1952 returns merely that he had a *capital loss,* which is limited to $1,000 yearly against ordinary income.

It is difficult to understand how the trial court and jury in this trial would be bound, as appellant claims (O. B. 59-65), with respect to the determination of the additional tax liability of appellant for the years 1954, 1955, and 1956, by a "quickie claim" allowed with respect to appellant's 1950 return. There was no final agreement as to the correctness or incorrectness of such an allowance. (Tr. 1011, 1015-1016.) Even if the gov-

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[12]Appellant's statement that the government's technical expert conceded that, on this examination of claims, the Internal Revenue Service "came to the conclusion that the defendant was a dealer in corporations," (citing Tr. 498) is not correct. Appellant has merely quoted the question asked of the expert by appellant's counsel but has failed to give the expert's reply, which was that he "would say that someone within the Service is requesting additional information to make a determination whether or not the defendant was in the business." The government's expert further answered (Tr. 499): "No, sir. I don't think I could say that I found any documents which would satisfy me that he was a dealer in corporations."

ernment were now precluded from assessing a deficiency concerning this "erroneous refund" (Tr. 430) on the 1950 return with respect to a loss claimed on account of a *loan,* the government was certainly not bound with respect to other tax years, *a fortiori* when it concerns a different kind of claim—i.e., a *stock* loss.

We submit that there was patently no grounds for the Court holding that as a matter of law there was no tax due and owing by appellant for the prosecution years. Since this contention constituted appellant's defense at the trial, the issue was properly submitted to the jury. By its verdict the issue was resolved against appellant. There was no error in the Court's handling of the issue.

CONCLUSION

Appellant had a fair and proper trial. The record supports the verdict. The instructions were correct. It is respectfully submitted that the judgment should be affirmed.

Dated, San Francisco, California,

March 1, 1963.

CECIL F. POOLE,
United States Attorney,

DAVID R. URDAN,
Assistant United States Attorney,

LAWRENCE K. BAILEY,
Attorney, Department of Justice,

Attorneys for Appellee.

CERTIFICATE

I certify that, in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

DAVID R. URDAN
Assistant United States Attorney
LAWRENCE K. BAILEY
Attorney, Department of Justice

Appendix

Appendix

Court's Instructions to the Jury (Tr. 1088-1132)

THE COURT:

Ladies and Gentlemen of the Jury:

We all agree that the jury has listened with commendable attention to the taking of the evidence in the case and to the arguments of counsel. We have now reached the stage of the trial of this case where the Judge of the Court has the duty of instructing you as to the principles of law which are applicable to the case, and I invite from you the same attention that you have given to the witnesses and to the counsel.

You ladies and gentlemen are obligated under your oaths as jurors to decide this case only upon the evidence which is before you. The evidence has been concluded. It consists of oral testimony given under oath by the witnesses who have appeared before you, the documentary evidence which has been received in evidence, and the stipulations as to facts which have been entered into in writing or orally by counsel during the trial of the case.

The proof which has been developed, the facts which are to be found, and the conclusions thereon, are entirely and solely within the province of you twelve members of the jury. I have nothing to do with the facts of the case.

Although you as jurors are the sole judges of the facts, you are duty-bound to follow the law as stated in the instructions of the Court and to apply the law so given to the facts as you find them from the evidence before you. I must not trespass, and I do not trespass upon your duty, the duty of determining the facts and the

credibility of the witnesses, and I expect that you will not trespass upon my duty, namely, to give you the applicable law.

You are not to single out one instruction alone as stating the law, but must consider the instructions as a whole.

Neither are you to be concerned with the wisdom of any rule of law. Regardless of any opinion you may have as to what the law ought to be, it would be a violation of your sworn duty to base a verdict upon any other view of the law than that given in the instructions of the Court.

In the course of my instructions I will give you some general rules applicable in all criminal cases to aid you in determining the weight of the evidence in the case and the manner in which you should adjudge the evidence.

These will be followed by specific instructions applicable to Counts One, Two and Three alone, and other specific instructions applicable to Counts Four, Five and Six alone. I will then conclude with such further general instructions as should be given to you before you retire to deliberate. Unless specifically limited to particular counts, all instructions given to you shall be deemed to apply to each count of the indictment.

You have been chosen and sworn as jurors in this case to try the issues of fact presented by the allegations of the indictment and the denials made by the "not guilty" plea of the accused. You are to perform this duty without bias or prejudice as to any party. The law does not permit jurors to be governed by sympathy, prejudice, or public opinion. The accused and the public expect that you will carefully and impartially consider all the evi-

dence, follow the law as stated by the Court, and reach a just verdict regardless of the consequences.

The law presumes a defendant to be innocent of crime. Thus, a defendant, although accused, begins the trial with a clean slate, with no evidence against him. And the law permits nothing but legal evidence presented before the jury to be considered in support of any charge against the accused. So the presumption of innocence alone is sufficient to acquit a defendant, unless the jurors are satisfied beyond a reasonable doubt of the defendant's guilt from all the evidence in the case.

A reasonable doubt is a fair doubt based upon reason and common sense and arising from the state of the evidence. It is rarely possible to prove anything to an absolute certainty. Proof beyond a reasonable doubt is established if the evidence is such as you would be willing to rely and act upon in the most important of your own affairs. A defendant is not to be convicted on mere suspicion or conjecture.

A reasonable doubt may arise not only from the evidence produced but also from a lack of evidence. Since the burden is upon the prosecution to prove the accused guilty beyond a reasonable doubt of every essential element of the crime charged, a defendant has the right to rely upon failure of the prosecution to establish such proof. A defendant may also rely upon evidence brought out on cross-examination of witnesses for the prosecution. The law does not impose upon a defendant the duty of producing any evidence.

A reasonable doubt exists in any case when, after careful and impartial consideration of all the evidence, the jurors do not feel convinced to a moral certainty that a defendant is guilty of the charge.

If, after considering all the evidence in the case, you should find that any one of the material facts relied upon by the prosecution to establish the guilt of the defendant as to any particular count has not been established to a moral certainty and beyond a reasonable doubt, then you must return a verdict finding the defendant not guilty as to such count or counts of the indictment, even though you should also find that other facts in the case have been established.

As I stated to you during the empanelment of the jury, an indictment is but a formal method of accusing a defendant of a crime. It is not evidence of any kind against the accused, and does not create any presumption or permit any inference of guilt.

There are two types of evidence from which a jury may properly find a defendant guilty of an offense. One is direct evidence, such as the testimony of an eye witness. The other is circumstantial evidence, the proof of a chain of circumstances pointing to the commission of the offense.

As a general rule, the law makes no distinction between direct and circumstantial evidence, but simply requires that, before convicting a defendant, the jury be satisfied of a defendant's guilt beyond a reasonable doubt from all the evidence in the case.

If the evidence in this case as to any particular count is susceptible of two constructions or interpretations, each of which appears to you to be reasonable, and one of which points to the guilt of the defendant and the other to his innocence, it is your duty under the law to adopt that interpretation which will admit of the defendant's innocence and reject that which points to his guilt.

You will notice that this rule applies only when both of the two possible opposing conclusions appear to you to be reasonable. If, on the other hand, one of the possible conclusions should appear to you to be reasonable and the other to be unreasonable, it would be your duty to adhere to the reasonable deduction and to reject the unreasonable; bearing in mind, however, that even if the reasonable deduction points to defendant's guilt, the entire proof must carry the convincing force required by law and as stated in the instructions to support a verdict of guilty.

When the case which has been made out against a defendant rests entirely or chiefly on circumstantial evidence, before you may find a defendant guilty, basing your findings solely on such evidence, each fact which is essential to complete a chain of circumstances that will establish the defendant's guilt must be proved beyond a reasonable doubt.

It is not incumbent upon the defendant to prove his innocence, nor is it incumbent upon him to explain suspicious circumstances. He has the right to stand mute and demand that the Government make the case against him beyond a reasonable doubt.

Statements and arguments of counsel are not evidence in the case, unless made as an admission or stipulation of fact. When the attorneys on both sides stipulate or agree as to the existence of a fact, the jury must accept the stipulation as evidence and regard that fact as conclusively proved.

The Court may take judicial notice of facts or events which are matters of common knowledge. When the Court declares it will take judicial notice of some fact or event, the jury must accept the Court's declaration as

evidence and regard as conclusively proved the fact or event which the Court has judicially noticed.

The evidence in the case consists of the sworn testimony of the witnesses, all exhibits which have been received in evidence, all facts which have been admitted or stipulated, all facts and events which have been judicially noticed, and all applicable presumptions stated in these instructions. Any evidence as to which an objection was sustained by the Court, and any evidence ordered stricken by the Court, must be entirely disregarded.

You are to consider only the evidence in the case. But in your consideration of the evidence you are not limited to the bald statements of the witnesses. On the contrary, you are permitted to draw, from facts which you find have been proved, such reasonable inferences as seem justified in the light of your own experience.

An inference is a deduction or conclusion which common sense and reason lead the jury to draw from facts which have been proved.

A presumption is a conclusion which the law requires the jury to make from particular facts, in the absence of convincing evidence to the contrary. A presumption continues in effect until overcome or outweighed by evidence to the contrary; but unless so outweighed, the jury are bound to find in accordance with the presumption.

Unless and until outweighed by evidence to the contrary, the law presumes that a person is innocent of crime or wrong-doing; that a witness speaks the truth; that official duty has been regularly performed; that private transactions have been fair and regular; that the ordinary course of business has been followed; that things have happened according to the ordinary course

of nature and the ordinary habits of life, and that the law has been obeyed.

All evidence relating to any oral admission or other incriminating statement claimed to have been made by a defendant outside of court should be considered with caution and weighed with great care.

The rules of evidence ordinarily do not permit a witness to testify as to his opinions or conclusions. A so-called expert witness is an exception to this rule. A witness who, by education and experience, has become expert in any art, science, profession or calling, may be permitted to state his opinion as to a matter in which he is versed and which is material to the case, and may also state the reasons for such opinion. You should consider each expert opinion received in evidence in this case and give it such weight as you think it deserves, and you may reject it entirely if you conclude the reasons given in support of the opinion are unsound.

Government's Exhibits 67, 68 and 69, introduced through the witness Forest P. Calkins, and Defendant's Exhibit L, introduced through the witness Edward F. Moran, are summaries and an analysis of the primary evidence only, and are not primary evidence within themselves. Both parties were afforded full opportunity to examine and cross-examine the witnesses with respect to these exhibits and the method of making the same. These exhibits and the testimony of the witnesses relating thereto should be considered by you and are entitled to weight only to such extent as you, the jury, should find that the primary testimony of other witnesses and the exhibits upon which these summary and the analysis were based are entitled to weight and credibility.

These summaries and the analysis have no independent

value and were admitted only for your assistance and convenience in considering the other evidence which they purport to summarize.

If you choose to disregard as evidence all or a part of the testimony of any witness in this case, or do not accept the correctness of any document admitted in evidence, then you must likewise disregard so much of the said summaries or analysis as is based upon the testimony of such witnesses and such documents you decide so to disregard.

You, as jurors, are the sole judges of the credibility of the witnesses and the weight their testimony deserves. A witness is presumed to speak the truth. But this presumption may be outweighed by the manner in which the witness testifies, by the character of the testimony given, or by contradictory evidence. You should carefully scrutinize the testimony given, the circumstances under which each witness has testified, and every matter in evidence which tends to indicate whether the witness is worthy of belief. Consider each witness's intelligence, motive and state of mind, and demeanor and manner while on the stand. Consider also any relation each witness may bear to either side of the case; the manner in which each witness might be affected by the verdict; and the extent to which, if at all, each witness is either supported or contradicted by other evidence.

Inconsistencies or discrepancies in the testimony of a witness, or between the testimony of different witnesses, may or may not cause the jury to discredit such testimony. Two or more persons witnessing an incident or a transaction may see or hear it differently; and innocent misrecollection, like failure of recollection, is not an uncommon experience. In weighing the effect of a dis-

crepancy, consider whether it pertains to a matter of importance or an unimportant detail, and whether the discrepancy results from innocent error or wilful falsehood. If you find the presumption of truthfulness to be outweighed as to any witness, you will give the testimony of that witness such credibility, if any, as you may think it deserves.

Merely because a witness happens to be an official of the Government does not mean that such witness is entitled to any greater or special credit to his testimony. The testimony of any such witness should be weighed and scrutinized in the same manner as any other witness who has testified in this case.

All evidence of a witness whose self-interest or attitude is shown to be such as might tend to prompt testimony unfavorable to the accused, should be considered with caution and weighed with great care.

A witness may be discredited or impeached by contradictory evidence, or by evidence that at other times the witness has made statements which are inconsistent with the witness's present testimony.

If you believe that any witness has been impeached and thus discredited, it is your exclusive province to give the testimony of that witness such credibility, if any, as you may think it deserves.

If a witness is shown knowingly to have testified falsely concerning any material matter, you have a right to distrust such witness's testimony in other particulars, and you may reject all the testimony of that witness or give it such credibility as you may think it deserves.

If you should find from the evidence that there was a failure on the part of the defendant to supply any information for the purposes of the computation, assess-

ment or collection of his income tax, and if you find that such failure to supply such information was deliberate and with intent to conceal income subject to tax, this is a circumstance which may be considered in your determination of his guilt or innocence. Such failure to supply information, however, refers only to his conduct during the course of the investigation.

In every crime there must exist a union or joint operation of act and intent.

The burden is always upon the prosecution to prove both act and intent beyond a reasonable doubt.

With respect to certain lesser offenses, if it be shown that a person has knowingly committed an act denounced by law as a crime, intent may be presumed from the voluntary doing of the forbidden act. But with respect to crimes such as charged in this case, specific intent must be proved before there can be a conviction.

Specific intent, as the term itself suggests, requires more than a mere general intent to engage in certain conduct.

A person who knowingly does an act which the law forbids, or knowingly fails to do an act which the law requires, intending with bad purpose, either to disobey or to disregard the law, may be found to act with specific intent.

An act or failure to act is done knowingly if done voluntarily and purposely, and not because of mistake or inadvertence or other innocent reason.

Intent may be proved by circumstantial evidence. It rarely can be established by any other means. While witnesses may see and hear and thus be able to give direct evidence of what a defendant does or fails to do, there

can be no eye-witness account of the state of mind with which the acts were done or omitted. But what a defendant does or fails to do may indicate intent or lack of intent to commit the offense charged.

It is reasonable to infer that a person ordinarily intends the natural and probable consequences of acts knowingly done or knowingly omitted. So unless the contrary appears from the evidence, the jury may draw the inference that the accused intended all the consequences which one standing in like circumstances and possessing like knowledge should reasonably have expected to result from any act knowingly done or knowingly omitted by the accused.

In determining the issue as to intent, the jury are entitled to consider any statements made and acts done or omitted by the accused, and all facts and circumstances in evidence which may aid determination of state of mind.

If you find from the evidence that there was taxable income received and reported as the law requires, it makes no difference insofar as the question of liability for tax is concerned whether such income was lawfully received or unlawfully received, since the law makes no distinction between taxable income which is lawful and that which is unlawful in determining liability for income taxes.

An attorney or a judge of the Superior Court of the State of California may engage in a private business. There is nothing in either the law or the canons of professional or judicial ethics which forbids this kind of activity, if otherwise lawful. In this connection you are to make no inference unfavorable to the defendant in this case from the fact that during the practice of his

profession as an attorney or during his term of judicial office he engaged in private business transactions.

In addition, I instruct you that when an individual takes office as a judge, who was previously engaged in a private law practice, there is nothing improper in his receiving compensation for legal work which was performed by him prior to his taking judicial office.

I further instruct you that should you find that the defendant received fees for legal services rendered after he took judicial office, he is not here on trial for such conduct, nor is he on trial for any other act or conduct not alleged in the indictment. Any fees received by the defendant after he took judicial office, should you be satisfied that such fees were in fact received, for the purposes of this trial, are to be treated the same and no different than any other income received by the defendant from any other source. The fees and other income received, and not the source thereof, are material to this case, to the degree that you find such fees and other income go to make up the income of the defendant which was subject to tax during the years in question.

A portion of the income the Government is attempting to prove as unreported income is alleged by the Government to have been distributed to him in the form of property or things of value other than money. The fair market value of such property or thing is the amount to be included as income. The burden is upon the Government to prove that such property so distributed has a market value in the amount claimed by the Government, or such value as would constitute the same substantial income.

If the services in exchange for which the property or things of value were received were rendered at a stipu-

lated price, in the absence of evidence to the contrary such price shall be presumed to be the fair market value of the compensation received.

Evidence to the contrary, and from which fair market value may be fixed, may be one or more of the following:

1. The price at which a willing buyer and a willing seller would arrive after negotiations, where neither is acting under compulsion.
2. The price at which such property has been sold at or about the time of distribution to the taxpayer. However, such sale must be an actual sale rather than a security transaction.
3. The book value, if any, of the property.
4. Any expression of opinion by persons who were in a position to know the value of the property, including the defendant.
5. And whether or not the property was productive of income or capable of producing income in the future, such capacity to produce income being tested by the expectations thereof at the time of distribution and not necessarily by the subsequent history of the property.

A taxpayer partner is taxable upon his distributive share of the partnership profits in the years his proportionate share was earned, even though subsequent disagreement with his partner and litigation precluded him from ever receiving any of his money.

The fact that each partner's distributive share in the net income of the common venture may not be currently distributed due to a dispute, or as the result of operation of state law, or until the contractual obligations of the

joint venture are fully performed, renegotiated, and its debts paid in accordance with the terms of the agreement of the parties, does not relieve them from reporting as income their proportionate shares of the net profit in the year it is earned.

This is true even though the taxpayer partner is on the cash basis of accounting and did not actually receive the income.

You may consider the defendant's failure to report income from the Tarman-Sherwin partnership in 1954, 1955 and 1956, if from the evidence you are satisfied beyond a reasonable doubt that he failed to report such income, on the question of his wilful intent to evade tax and on the question of whether when he made and subscribed his tax returns for those years he believed them correct as to every material matter.

For income tax purposes, a joint venture and a partnership are the same, and income from a joint venture is required to be reported in the same manner as income from a partnership.

There is a distinction between the civil liability of a defendant and the criminal liability. This is a criminal case. The defendant is here charged with the commission of a crime, and the fact that he may have or may not have settled the civil liability for the payment of taxes claimed to be due to the United States is not to be considered by you in determining the issues in this case, except as it may throw some light on the intent of the defendant.

The first three counts of the indictment cover the calendar years 1954, 1955 and 1956. Except for the amount of taxable income and the amount of tax due and owing for each of such years, Counts One, Two and

Three are identical in all other respects. Hence, I shall now read to you only the first count: The first count of the indictment alleges a violation of Section 7201, Title 26, United States Code:

> "The Grand Jury charges that on or about July 15, 1955, in the Northern District of California, Southern Division, Marvin Sherwin, defendant herein, who during the calendar year 1954 was married, did wilfully and knowingly attempt to evade and defeat a large part of the income tax due and owing by him and his wife to the United States of America for the calendar year 1954, by filing and causing to be filed with the District Director of Internal Revenue at San Francisco, California, a false and fraudulent joint income tax return on behalf of himself and his wife, wherein it was stated that their taxable income for the calendar year 1954 was $21,211.01, and that the amount of tax due and owing thereon was $5,743.60; whereas, as he then and there well knew, their taxable income for the calendar year 1954 was $33,993.64, upon which taxable income there was due and owing to the United States of America an income tax of $11,396.82."

Counts One, Two and Three of the indictment charge the defendant, as I stated, with a violation of 26, United States Code, Section 7201, which in pertinent part reads as follows:

> "Any person who wilfully attempts in any manner to evade or defeat any tax imposed by the Internal Revenue Code or the payment thereof, shall be guilty of an offense against the laws of the United States."

Three essential elements are required to be proved in order to establish the offense charged in each of Counts One, Two and Three of the indictment:

> First: The fact that a substantial amount of federal income tax was in fact due and owing from the defendant for the calendar years in question, namely, 1954, 1955 and 1956, in addition to the tax declared or disclosed in the defendant's income tax returns for said calendar years;
>
> Second: Knowledge of the defendant that some additional income tax of a substantial amount was due and owing from him to the Government for such calendar years; and
>
> Third: The fact that the defendant in the manner charged in such counts of the indictment wilfully attempted to evade or defeat the additional tax, with the specific intent to defraud the Government of such additional tax.

Failure to prove any one of these three elements beyond a reasonable doubt will entitle the defendant to a verdict of not guilty on such of Counts One, Two and Three as to which such convincing proof is lacking.

It is not necessary that the evidence establish an evasion of all the tax alleged in the indictment. It is sufficient if the evidence establishes beyond a reasonable doubt that the defendant wilfully attempted to evade any substantial portion of the tax as charged.

Further as to Counts One, Two and Three, I charge you that the word "attempt," as used in the statute just read and in the indictment and these instructions, involves two things: (1) An intent to evade or defeat the tax, and (2), some act done in furtherance of such intent. Thus the word "attempt" contemplates that the

accused had knowledge and understanding that during the calendar years 1954, 1955 and 1956 he had an income which was taxable and which he was required by law to report, and that he nevertheless attempted to evade or defeat the tax thereon, or a substantial portion thereof, by purposely failing to report all the income which he knew he had during such calendar years and which he knew it was his duty to state in his returns for such years, or in some other manner.

Various schemes, subterfuges and devices may be resorted to in an attempt to evade or defeat a tax. The one alleged in the indictment is that of filing false and fraudulent returns with the intent to defeat the tax. The statute plainly makes it an offense wilfully to attempt to evade in any manner any income tax imposed by law.

The attempt to evade or defeat the tax must be a wilful attempt; that is to say, it must be an attempt knowingly made with the specific intent to keep from the Government a tax imposed by the income tax laws which it was the duty of the defendant to pay to the Government.

In other words, the attempt must be knowingly made with the bad purpose of seeking to defraud the Government of some substantial amount of income tax lawfully due from the defendant.

Section 7201 of the Internal Revenue Code, which I quoted to you and which applies to the first three counts, makes any person guilty of crime who "wilfully attempts in any manner to evade or defeat any income tax or the payment thereof."

The mere failure of a taxpayer to report a portion of his taxable income is not a crime within the meaning of this section unless it has been proved beyond a reason-

able doubt that he wilfully attempted to defeat or evade his income taxes.

You are instructed that in common, everyday speech "wilful" denotes an act which is intentional, knowing or voluntary, as distinguished from accidental; but when it is used in a criminal statute, where one of the elements is a specific intent to defraud, it has a somewhat different meaning. It generally means an act done with a bad purpose, without justifiable excuse. The word "wilful" is also used to characterize a thing done without ground for believing it is lawful.

You are instructed that the thing done is not necessarily and under all circumstances required to be lawful. It is sufficient to exculpate and exonerate a defendant if it is honestly believed to be lawful. Or to put it conversely, it is unlawful if it is done without grounds for believing in its lawfulness.

If an act is done in good faith, based upon an actual belief of a defendant, even if such belief is a mistaken one, or a negligent one, or if such defendant is in ignorance of either facts or law rendering it unlawful; and if you believe that the defendant, Marvin Sherwin, honestly made a mistake, honestly was negligent and honestly was either ignorant of the facts or ignorant of the law, you will then determine that his conduct in doing what he did was not wilful.

As I indicated to you, one of the essential elements to be established beyond a reasonable doubt as to the first three counts of the indictment is that a substantial amount of federal income tax was due and owing from the defendant for the particular years covered by these counts.

If you find that no such tax was due, or that the

defendant honestly believed no such tax was due for any of these years, you shall find the defendant not guilty on the count or counts covering such years for which you may so find.

If, on the other hand, you are satisfied beyond a reasonable doubt that a substantial tax (over and above that declared or disclosed in the returns) was due and owing from the defendant for any of such years, and that the defendant knew or believed the same to be due, and that with such knowledge and belief he filed a false and fraudulent income tax return for any such year in a wilful attempt to evade and defeat a large part of the tax due for such year, and with intent to defraud the Government of such additional tax, you shall find the defendant guilty on such count or counts of Counts One, Two and Three, covering the years for which you so find.

I shall now instruct you on the question of whether the losses sustained by the defendant by reason of the bankruptcy of T. R. Bechtel Company and Bechtel Lumber Company were net operating losses in a business of the defendant or a loss from the sale or exchange of capital assets.

This question applies directly to the first three counts and has no application to the last three counts, except to the degree that you may find such losses have a bearing on his intent or, to be more specific, his belief that his returns were true and correct as to every material matter.

This question as to the nature of these losses is a question of fact to be determined by you, the jurors, from the evidence in the case and in accordance with the applicable tests that I shall give to you.

The defendant claims that such bankruptcy resulted in the stocks of these corporations becoming worthless, and were therefore net operating losses arising from the operation of a business of the defendant.

The Government claims that these losses were not net operating losses arising from the operation of a business of the defendant, but were in fact losses from the sale or exchange of capital assets.

This becomes of importance to you in determining whether or not under the first three counts the prosecution has proven beyond a reasonable doubt that in fact there was a substantial amount of federal income tax due and owing from the defendant for any of the particular tax years in question, in addition to the tax declared or disclosed in the defendant's income tax returns for such years.

If you find that the losses of the defendant arising from the bankruptcy of the Bechtel corporations were in fact net operating losses from a business of the defendant, and that such losses which occurred in 1951 were greater than his taxable income for said year, such losses may be carried back to the year 1950, and any losses still remaining may be carried forward until extended through each of the years for which the defendant is under indictment on Counts One, Two and Three.

On the other hand, if you find that these particular losses arising from such bankruptcy were not net operating losses from a business of the defendant, you shall treat them as losses arising from the sale or exchange of capital assets, and such losses, for carry-over purposes to the years 1954, 1955 and 1956, shall be limited to $1,000 per year; and that amount was credited to him by the Government for each of such years.

The question of whether or not such losses were net operating losses from a business of the defendant or a loss from a sale or exchange of capital assets depends upon whether or not the defendant was actually engaged in a business separate and apart from his profession, in which losses were incurred in the operation of such business.

If under the test I give you, you find that the defendant was not engaged in a separate business, or if you find that such losses were not incurred in the operation of such separate business of the defendant, you shall treat such losses as losses from the sale or exchange of capital assets.

The business of the corporation may not be treated as the business of the stockholder. The mere fact that a person is a stockholder in corporations or active or interested in their affairs is not sufficient to say he is in the business of organizing and promoting corporations or to justify treating any advances to the corporation as business loans. A person must be extensively and regularly engaged in the business of promoting and financing business ventures to elevate that activity to the status of a separate business.

The defendant claims he was engaged in the separate business of promoting corporations. While any individual, including an attorney, may engage in any trade or business other than his particular profession, all the facts and circumstances must be examined to determine whether he is in fact engaged in such trade or business, in this instance, the promoting of corporations, or was merely rendering the services usually rendered by an attorney who incorporates businesses, makes substantial investments therein, and acts as attorney, director and

officer of such corporations in the conduct of the business and affairs of such corporations. If this is the limit and character of his financial investment, and the limit and character of the time, energy and interest he devotes to the business or affairs of such corporation, he cannot be deemed to be engaged in a separate trade or business.

More is required. To establish that he was engaged in the business of promoting corporations, the evidence must show that the defendant's investments, advances and activities were extensive, varied, frequent and regular, and with a profit motive arising from such activities on his part and not merely from future profits of the corporation distributable to him in proportion to his investment in such corporations.

A taxpayer's claim to a deduction from gross income is a statutory privilege; hence, the burden of going forward to prove such facts as will sustain the defendant's contention that these losses were net operating losses and therefore deductible in the manner he claims, rests with him.

If you find from the evidence that the defendant has established (or created a reasonable doubt in your minds as to whether or not he has established) that his investments in the Bechtel corporations and such other corporations in which he claims to have invested were substantial and varied and that his activities were so extensive, and with such frequency and regularity, as to consume a substantial portion of his time and energy, all for the purpose of making the business of the corporations succeed, then his investments and his activities were such that the losses sustained by him by reason of the bankruptcy of the Bechtel corporations constituted

net operating losses, deductible and subject to carry-back and carry-forward in the manner I have indicated.

If you find from the evidence and the test for the determination thereof given to you in these instructions that the defendant suffered net operating losses by reason of the bankruptcy of the Bechtel corporations, you shall fix the amount thereof as you will find it from the evidence.

The amount of the defendant's loss on the worthless stocks of the Bechtel corporations is limited to the excess of his cost basis in that stock over the amount realized (which in this case was zero because the stocks became worthless) rather than the excess of the fair market value over zero.

The agreement referred to in the testimony as that between Tarman and Sherwin of February 28, 1950, was a partial distribution of partnership interests and, as such, was not subject to tax.

The cost basis of the Bechtel Company stocks in the hands of the defendant when he received such stock pursuant to that agreement has been fixed from the evidence in this case in at least three different amounts: in the sum of about $58,000 by Agent Nielands, if the assumptions upon which his conclusions are based are correct; in the sum of $60,000 on the defendant's claim of capital loss on that stock in the tax returns of himself and his wife for the year 1951; and in the sum of $157,000 by Mr. Moran, if the assumptions upon which his conclusions are based are correct. What that loss in fact was, in the light of the evidence, is, as I previously stated, for you, the jury, to determine.

If a taxpayer honestly believes that he has paid all the taxes he owes, he is not guilty of criminal evasion.

But if he acts without reasonable ground for belief that his conduct was lawful, it is for you to decide whether he was acting in good faith or whether he intended to evade the tax.

The question of intent is a matter for you, as jurors, to determine. It is not possible to look into a man's mind to see what went on. For you to arrive at the intent of the defendant in this case, you must take into consideration all the facts and circumstances shown by the evidence, including the exhibits, and determining from all such facts and circumstances what the intent of the defendant was at the time in question. Wilfulness, of course, may be inferred from circumstances, and it is not necessary to prove wilfulness by direct evidence in an income tax evasion prosecution. Indeed, wilful intent in attempting to evade and defeat payment of tax may be supported by circumstantial evidence. Intent may be inferred from acts, and inferences may arise from a combination of acts, although each act standing by itself may seem unimportant.

Section 7201 of the Internal Revenue Code which, as I have stated, is applicable to the first three counts, punishes a wilful attempt to evade and defeat taxes in any manner. On this question of intent to evade income taxes there are a number of circumstances which you may consider in determining such intent. You may consider whether or not there was a concealment of assets, the covering up of sources of income, the number of income items omitted each year and their gross amounts, the handling of one's affairs to avoid the making of usual records, and any other such conduct, the likelihood of which would be to mislead or conceal are illustrations of the type of conduct or acts from which you may infer

intent to evade taxes if you are satisfied beyond a reasonable doubt from the evidence that such conduct existed in this case. If the tax evasion motive plays any part in such conduct, the offense may be made out even though the conduct I have mentioned might also serve some other purpose.

The question of intent is a question you must determine for yourself from a consideration of all the evidence.

If you find from the evidence that the defendant sought advice and counsel with respect to his income tax liability for the years 1954, 1955 and 1956 from an accountant, whom he thought would properly and correctly prepare his income tax returns, and if you further find that the defendant honestly attempted to provide such accountant and advisor with all the information reasonably necessary to enable such accountant to prepare correct income tax returns, and that the taxpayer, when he signed the same, presumed and believed that they were true and correct, then your verdict should be not guilty as to Counts One, Two and Three, for there would be absent the element of knowing and wilful intent to evade or attempt to evade the payment of income taxes; and your verdict should be not guilty as to Counts Four, Five and Six, for there then would have existed in the mind of the taxpayer an honest belief that the return was true and correct as to every material matter, even though it should later develop that said income tax returns were materially wrong.

As to any one of Counts One, Two and Three of the indictment, if you find from the evidence that the defendant in doing the acts detailed by the evidence introduced upon the trial herein, acted without corrupt

intent, that is to say, the intent to evade or defeat a large part of the income tax due and owing by him and his wife for the years in question, such lack of corrupt intent will entitle the defendant to an acquittal at your hands as to any such counts on which you so find.

Similarly, as to any one of Counts Four, Five and Six of the indictment, if you find from the evidence that the defendant, in subscribing to the joint tax return or returns for the years covered by the indictment, acted without corrupt intent in so subscribing, that is to say, with the belief that said joint return or returns were true and correct as to every material matter, such lack of corrupt intent will entitle the defendant to an acquittal at your hands as to any such counts on which you so find.

Counts Four, Five and Six of the indictment cover the calendar years 1954, 1955 and 1956. Except for the amount and source of the defendant's income, and the amount of additional income he is alleged to have failed to disclose for each of such years, said counts are identical in all other respects; hence, I will now read to you only the fourth count. It alleges that:

> "On or about July 15, 1955, in the Northern District of California, Southern Division, Marvin Sherwin, defendant, in violation of Title 26, United States Code, Section 7206, sub-paragraph 1, did wilfully and knowingly make and subscribe and file with the District Director of Internal Revenue at San Francisco, California, a joint income tax return for the calendar year 1954, in his name and in the name of his wife, Georgia Sherwin, which was verified by the defendant by a written declaration that it was made under the penalty of perjury,

which said joint income tax return for the calendar year 1954, the defendant did not believe to be true and correct as to every material matter in said joint income tax return for the calendar year 1954, in that the defendant stated that the income of himself and his wife for the calendar year 1954 was as follows:

"County of Alameda, $9,250.00; State of California, $7,500.00; Chip Steak Company, $5,520.00; other income, $2,505.56;

"Whereas, as he then and there well knew, he had additional income amounting to $12,801.45 which he failed to disclose in his and his wife's said joint return."

The federal statute to which these counts of the indictment refer, and with which the defendant is charged with violating, is Section 7206, sub-paragraph 1, Title 26, United States Code. Insofar as it is pertinent here to this case that statute reads as follows:

> "Any person who wilfully makes and subscribes any return, statement or other document which contains or is verified by a written declaration that it is made under the penalty of perjury, and which he does not believe to be true and correct as to every material matter, shall be punished as provided by law."

Now, for a violation of this statute to occur, three essential elements must be established beyond a reasonable doubt. They are:

1. A wilful making and subscribing of a return, statement or other document.
2. The return, statement or other document must contain a written declaration that it is made under the penalty of perjury.

3. The maker must not believe the return, statement or other document to be true and correct as to every material matter.

I instruct you as a matter of law that the federal income tax return, Form 1040, and their attached addenda and schedules, as made and subscribed by the defendant for the years 1954, 1955 and 1956, if you find such documents were made and subscribed by the defendant, are returns as contemplated by Section 7206 (1), Title 26, U. S. Code, which I just read to you.

In order to find the defendant guilty of any or all of the charges complained of in Counts Four, Five and Six of the indictment, you must not only believe that he did the acts complained of and of which he stands charged, but you must also believe that the acts were wilfully done by him.

The word "wilful," as used in this statute means deliberately and with knowledge, as distinguished from something which is merely careless, inadvertent or negligent.

Whether or not the act is done wilfully is a fact which must be determined by reasonable inference established from the facts proved by the evidence. Here, too, you cannot look into the defendant's mind to see what his intention was when he allegedly made the statements in question on his 1954, 1955 and 1956 federal income tax returns. If you find the defendant signed his income tax returns for these years, you may consider that as a circumstance in determining whether he had knowledge of the contents of those income tax returns. Wilfully means intentionally and not accidentally.

You are instructed that it is not necessary for the

Government to prove that there was a tax due and owing for any of the years in question in order to prove Counts Four, Five and Six of the indictment. The existence of a tax liability is not an element of the offense of wilfully subscribing to a tax return under the penalties of perjury when such tax return is not believed to be true and correct as to every material matter.

In order to find the defendant guilty of Counts Four, Five and Six of the indictment you must be satisfied beyond a reasonable doubt that the failure of defendant to report additional income received by him, if you so further find, was a material omission; in this connection, I instruct you that omission of a substantial part of the taxpayer's gross income from his tax return constitutes a material omission, and if you are satisfied beyond a reasonable doubt that there was such omission, and that it was wilful, and that the defendant had knowledge thereof, you shall find the defendant guilty as to such counts on which you so find.

The term "gross income" means all income from whatever source derived, including:

1. Compensation for services, fees, commissions, and similar items;
2. Gross income derived from business;
3. Gains derived from dealings in property;
4. Interest;
5. Dividends;
6. Distributive shares of partnership gross income.

In connection with Counts Four, Five and Six, if a person in good faith believes that his income tax return,

as prepared by him or as caused to be prepared by him, truthfully reports the taxable income and allowable deductions of the taxpayer, he cannot be guilty as to said counts.

Under Counts Four, Five and Six of the indictment, I instruct you that in order to convict the defendant you must find that any omission which was made in the defendant's return was wilfully omitted, and in this connection I instruct you that if the defendant did not believe that he had additional income which he was required to report when he made and subscribed his tax return, then you may not find the defendant guilty under these counts of the indictment.

Under Counts Four, Five and Six of the indictment the Government must prove that any fraudulent omission in the tax return of the defendant was for the purpose of defrauding or deceiving the United States of America in some material manner.

The law of the United States permits the judge to comment to the jury on the evidence in the case. Such comments are only expressions of the judge's opinion as to the facts, and the jury may disregard them entirely, since the jurors are the sole judges of the facts.

During the course of the trial I occasionally asked questions of a witness in order to bring out facts not then fully covered in the testimony. As I previously stated, do not assume that I hold any opinion on the matters to which my questions related. Remember at all times that you, as jurors, are at liberty to disregard all comments of the Court in arriving at your own findings as to the facts.

It is the duty of the Court to admonish an attorney who, out of zeal for his cause, does something which is

not in keeping with the rules of evidence or procedure. You are to draw no inference against the side to whom an admonition of the Court may have been addressed during the trial of this case.

And I might add here parenthetically that this case was well conducted by counsel for both sides, and conducted in accordance with the highest traditions of the American Bar.

It is the duty of attorneys on each side of a case to object when the other side offers testimony or other evidence which counsel believes is not properly admissible.

When the Court has sustained an objection to a question, the jury are to disregard the question and may draw no inference from the wording of it or speculate as to what the witness would have said if permitted to answer.

Upon allowing testimony or other evidence to be introduced over the objection of counsel, the Court does not, unless expressly stated, indicate any opinion as to the weight or effect of such evidence. As stated before, the jurors are the sole judges of the credibility of all witnesses and the weight and effect of all evidence.

As you have noted, a separate crime or offense is charged in each of the six counts of the indictment. Each offense and the evidence applicable thereto should be considered separately. The fact that you may find the accused guilty or not guilty of one of the offenses charged should not control your verdict with respect to any other offense charged.

The verdict must represent the considered judgment of each juror. In order to return a verdict, it is necessary that each juror agree thereto. Your verdict must be unanimous.

It is your duty, as jurors, to consult with one another and to deliberate with a view to reaching an agreement, if you can do so without violence to individual judgment. Each of you must decide the case for yourself, but do so only after an impartial consideration of the evidence with your fellow jurors. In the course of your deliberations do not hesitate to re-examine your own views and change your opinion if convinced it is erroneous. But do not surrender your honest conviction as to the weight or effect of evidence solely because of the opinion of your fellow jurors, or for the mere purpose of returning a verdict.

You are not partisans. You are judges—judges of the facts. Your sole interest is to ascertain the truth from the evidence in the case.

There is nothing peculiarly different in the way a jury is to consider the proof in a criminal case from that in which all reasonable persons treat any question depending upon evidence presented to them. You are expected to use your good sense, consider the evidence for only those purposes for which it has been admitted, and give it a reasonable and fair construction in the light of your common knowledge of the natural tendencies and inclinations of human beings.

If the accused be proved guilty, say so; if proved not guilty, say so.

Keep constantly in mind that it would be a violation of your sworn duty to base a verdict upon anything but the evidence in the case.

Remember, also, that the question before you can never be: Will the Government win or lose the case? The Government always wins when justice is done, regardless of whether the verdict be guilty or not guilty.

The punishment provided by law for the offense charged in the indictment is a matter exclusively within the province of the Court, and is not to be considered by the jury in arriving at an impartial verdict as to the guilt or innocence of the accused.

Upon retiring to the jury room, you will select one of your number to act as foreman. The foreman will preside over your deliberations and be your spokesman in court.

A form of verdict has been prepared for your convenience. I shall now read the form of verdict which has been prepared for your convenience:

> "United States of America vs. Marvin Sherwin, No. 37990.
>
> "VERDICT
>
> "We, the jury, find Marvin Sherwin, the defendant at the bar _____ as to Count One, _____ as to Count Two, _____ as to Count Three, _____ as to Count Four, _____ as to Count Five, _____ as to Count Six."

And then there appears a line for the signature of the foreman. You will take this form to the jury room and when you have reached unanimous agreement as to your verdict, you will have your foreman fill in the blanks by using the words "guilty" or "not guilty", date and sign the form that states the verdict upon which you agree, and then return with your verdict to the courtroom.

If it becomes necessary during your deliberations to communicate with the Court, you may send a note by the bailiff. Never attempt to communicate with the

Court except in writing. And bear in mind always that you are not to reveal to the Court or any person how the jury stands, numerically or otherwise, on the question of the guilt or innocence of the accused, until after you have reached a unanimous verdict.

It is proper to add the caution that nothing said in these instructions—nothing in any form of verdict prepared for your convenience—is to suggest or convey in any way or manner any intimation as to what verdict I think you should find. I repeat, what the verdict shall be is the sole and exclusive duty and responsibility of the jury.

And now, gentlemen, the Court has completed its instructions to the jury, and unless counsel for the plaintiff or defendant have further or additional objections or exceptions to the Court's instructions as just given, I think it might be understood for the record that all objections and exceptions heretofore taken by counsel for the Government and counsel for the defendant will be considered as if said exceptions were made at this time and entered in the record and have the same force and effect as if repeated in full on all the grounds heretofore given.

Now, are there any additional objections or exceptions other than those heretofore stated?

MR. COONEY: I have no additional ones other than those stated the other day.

MR. BURNS: I have one, Your Honor.

THE COURT: Yes, Mr. Burns?

MR. BURNS: It should be made, I believe, in the absence of the jury.

THE COURT: Yes.

Ladies and gentlemen of the jury, the Court has not

as yet completed its instructions. In accordance with prescribed rules of procedure, you will retire to the jury room and the Court will give consideration to an additional matter, and will thereafter indicate to you whether or not its instructions have been completed and then indicate to you when you may retire for your deliberations.

You are excused for the moment, and the admonition which I heretofore gave you holds.

(Thereupon, the jury retired from the courtroom and the following proceedings were had.)

MR. BURNS: In one of the last instructions which Your Honor gave the jury, I have this comment to make. The instruction is this, in substance: you told the jury to exercise their common sense and if the defendant is proven guilty, say so; if the defendant is proved not guilty, say so.

THE COURT: Yes.

MR. BURNS: In my opinion, that instruction places a burden of proof upon the defendant which he does not have. I think the instruction should be, if the defendant has been proven guilty, say so, and if the proof fails to satisfy you beyond a reasonable doubt of the defendant's guilt, say so, rather than placing the burden of proof upon the defendant.

THE COURT: Very well. Mr. Burns, I might add that this instruction has been given innumerable times. It is one of the, shall I say, so-called classics set forth by Judge Mathis and reported for the benefit of judges throughout the country at various seminars and in the Federal Rules Decisions.

However, I am satisfied in my own mind that the

observation you have just made is a proper and correct one, and hence I shall cause the jury to be re-instructed with relation to that particular instruction.

Are there any other objections or exceptions?

MR. FOSTER: Two minor exceptions, Your Honor. At the commencement of the instructions Your Honor gave the standard instruction concerning the natural and probable consequences of a defendant's act, and it is my belief that that instruction is inapplicable in a case of this character.

THE COURT: I think it is clearly applicable in a case of this character.

MR. FOSTER: And the other objection which I would like to make, Your Honor, to Your Honor's instructions is to your comments upon the Tarman-Sherwin partnership income, which I believe is not a proper factor in the case. I believe Your Honor instructed that the jury could take into account any unreported income from the Tarman-Sherwin partnership—

THE COURT: "If you so find."

MR. FOSTER: "If you so find."

THE COURT: Yes. I accept the suggestion that has been made, and the jury may be recalled. I will have to find the particular numbered instruction.

MR. BURNS: Might I say on behalf of the defendant that the defendant is otherwise satisfied with the instructions and thanks Your Honor for the instructions, and likewise counsel thank you for the comment.

THE COURT: Thank you. I might say, Mr. Burns, it says, "if not proved guilty, say so", but I am accepting your observation. I feel that this is a very proper observation despite the fact that we have had a long history of use of this instruction. We have learned from

opinions from time to time that it is advisable to reconsider instructions given in the past.

MR. BURNS: As I heard the instruction, the word "not" was not used. It was "defendant proved not guilty" instead of "defendant not proved not guilty."

THE COURT: I shall put it in the form you have suggested, and I think it is a good suggestion.

MR. BURNS: Thank you. I assume Your Honor has in mind discharging the two alternate jurors?

THE COURT: Yes.

(Thereupon, the jury returned to the courtroom and the following proceedings were had.)

THE COURT: Ladies and gentlemen of the jury: during the recess counsel properly directed my attention to the fact that in a part of the recitation I apparently misplaced a "not" in one sentence. Apparently I said, "if the accused be proved guilty, say so; if proved not guilty, say so."

I should certainly correct this instruction because the fact of the matter is that if the evidence establishes the guilt of the accused beyond a reasonable doubt, you should say so: if, on the other hand, the evidence does not establish the guilt of the accused beyond a reasonable doubt, you should say so. So that with this clear correction in mind, the case is ready to go to you for your deliberation. This completes the instructions. I shall respectfully request that the two alternate jurors remain seated in the courtroom while the jury retires to conduct their deliberations.

So the jury, with the exception of the two alternates, will now retire to the jury room.

(Thereupon, at the hour of 10:55 a.m., the jury retired to deliberate upon its verdict.)

Appellant's Proposed Instruction No. 19

SUBJECT: Wilfulness.

You are instructed that in common, everyday speech, "wilful" denotes an act which is intentional, knowing or voluntary, as distinguished from accidental, but when it is used in a criminal statute, where one of the elements is a specific intent to defraud, it has a somewhat different meaning. It generally means an act done with a bad purpose, without justifiable excuse. The word "wilful" is also used to characterize a thing done without ground for believing it is lawful.

You are instructed that the thing done is not necessarily and under all circumstances required to be lawful. It is sufficient to exculpate and exonerate a defendant if it is honestly believed to be lawful. Or to put it conversely, it is unlawful if it is done without grounds for believing in its lawfulness.

If an act is done in good faith, based upon an actual belief of a defendant, even if such belief is a mistaken one, or a negligent one, or if such defendant is in ignorance of either facts or law rendering it unlawful; and, if you believe that the defendant, Marvin Sherwin, honestly made a mistake, honestly was negligent and honestly was ignorant of the facts or ignorant of the law, you will then determine that his conduct in doing what he did was not wilful.

Authority: *U. S.* v. *Murdock,* 290 U.S. 389.